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QUESTIONS AND ANSWERS

ON

LAW.

ALPHABETICALLY ARRANGED.

WITH

REFERENCES TO THE MOST APPROVED AUTHORITIES.

BY

ASA KINNE

VOLUME I.

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ADDRESS ASA KINNE, ASTOR HOUSE.

1855.

DISTRICT OF COLUMBIA, TO WIT.

Be it remembered, that on the eighth day of June, Anno Domini, eighteen hundred and thirty-nine, Asa Kinne, of the said District, deposited in this office the title of a book, the title of which is in the words following: "Questions and Answers on Law, alphabetically arranged, with references to the most approved authorities; by Asa Kinne;" the right whereof he claims as author. In conformity with an Act of Congress, entitled, "An act to amend the several acts respecting Copyrights."

EDM. J. LEE, Clerk of the District.

In testimony that the foregoing is a true copy from the record in my office, I, Edmund J. Lee, Clerk of the District Court of the District of Columbia, hereto set my hand and the seal of said court, this eighth day of June, 1839.

EDM. J. LEE, D. C. D. C.

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PREFACE.

IN presenting the following pages to the public, the author deems it proper to observe, that they are not supposed by him to be perfect in their design, or free from many errors in their execution. The notes from which they are made up, with the exception of some of the cases and authorities, were not collected with a view to publication, but were accumulated during the course of several years' research and ordinary business. In 1839, a few were printed for the purpose of reducing some loose slips to a more convenient compass, some copies of which came to the hands of the profession, and with much liberality were favorably received, which induced the author to believe that a more copious collection, with a more orderly arrangement, might be deemed of some utility; acting upon that belief, he devoted his leisure time to arranging and revising a portion of his notes, which has resulted in the present volume. Much care has been taken to support the rules laid down in the answers, not only by the case or book from which an answer may have been extracted, but also by citing numerous other cases governed by the same or analogous principles; this it is thought may be of some utility in enabling the inquirer to consult a number of cases, without being obliged to ransack a whole library to find them.

In revising the notes many books both foreign and domestic have been consulted, but more especially the reports of the Supreme Court of the United States, and those rich repositories of legal learning, the works of our two distinguished American jurists, Mr. Chancellor Kent, and Mr. Justice Story, to whom a hearty acknowledgment is returned for the free use which we have made of their labors.

It may be proper further to state, that the author purposes to continue this compilation through the cycle of the alphabet, so soon as his health and other duties give him time to arrange the manuscript now on hand.

TABLE

Explaining the principal abbreviations used in the following pages.

Add.	Addison.	Barnar.	Barnardiston.
Aik.	Aikin.	Bun.	Bunbury.
Atk.	Atkins.	Brid.	Bridgman.
Anth.	Anthon.	Ben.	Benloe.
Ambl.	Ambler.	Bulst.	Bulstrode.
Act.	Acton.	Bull. N. P.	Bull's Nisi Prius.
Archb.	Archbold.	Brownl.	Brownlow.
Art.	Article.		
Amstr.	Amsterdam.	C. & P.	Carrington & Payne.
Ant.	Antwerp.	Cam. Sac.	Exchequer Chamber.
Adolph & El.	Adolphus & Elis.	C. C. R.	Circuit Court Reports.
Ad. R.	Adams' Rep.	Camp. N. P.	Campbell's Nisi Prius.
And. R.	Andrews's Rep.	Cart.	Carthew.
B. & A.	Barnwell & Alderson	C. & F.	Clark & Finnelly.
	R.	Camp. & Nor.	Cameron & Norwood.
B. & Adolph.	Barnwell & Adolphus	Chip.	Chipman.
	R.	Chit. Com.	Chitty's Commercial
B. & C.	Barnwell & Creswell R.		Law.
B. & P.	Bosanquet & Puller R.	Cald.	Caldicott.
Bac. Abr.	Bacon's Abridgment.	Cow.	Cowen.
Bayl.	Bayley.	Cowp.	Cowper.
Bing.	Bingham.	Cond.	Condensed.
Binn.	Binney.		
Blac. Com. R.	Blackstone's Commen-	C. P.	Common Pleas.
	taries Reports.	Conn.	Connecticut.
Blackf.	Blackford.	Combe.	Comberbach.
Bro. P. C.	Brown's Parliament	Cro. & Mees.	Crompton & Meeson.
	Cases.	Cunn.	Cunningham.
Bro. Ch. R.	Brown's Chancery Re-	Com. Dig.	Comyn's Digest.
	ports.	Co. Lit.	Coke on Littleton.
Bro. Abr.	Brooks' Abridgment.	Cro. Jac. E.	Croke's Reports in the
Bro. & Bing.	Broderip & Bingham.	liz. Car.	time of James, Eliza-
Burr.	Burrows.		beth, Charles, &c.
Balds.	Baldasseroni.	Const. Rep.	Constitutional Reports
Bynk.	Bynkershoek.	S. C.	of South Carolina.
Bilb.	Bilboa.	Charl.	Charlton.
Bre.	Brevard.	Clei.	Cleirac.
Brock.	Brockenbrough.	Com. Rep.	Common Report.
Bray.	Brayton.	Cock. & R.	Cockburn & Rowe.
Beav.	Beavan.		

Curt.	Curties.	Hawk. P. C.	Hawkins' Pleas for the Crown.
Cr. C. C.	Crown Circuit Companion.	Hardw.	Hardwick.
Dalt.	Dalton.	Hagg.	Haggard.
D'An.	D'Anvers.	Hin.	Hineceus.
Dall.	Dallas.	High.	Highmore.
Dick.	Dickinson.	Hob.	Hobert.
Dig. ff. lib. tit.	Digest, book, title.	Hoff.	Hoffman.
D. & R.	Dowling & Ryland.	Hamb.	Hamburgh.
D. & E.	Durnford & East.	Inst.	Institutes.
Dan.	Daniel.	Ins. Co.	Insurance Co.
D. & C.	Dow & Clark.	Jac. Dic.	Jacobs' Dictionary.
Doug.	Douglas.	Jac. & W.	Jacob & Walker.
Dessau.	Dessaure.	Jenk.	Jenkins.
Dev. & Bat.	Devereux & Battle.	Jer.	Jeremy.
Dom.	Domat.	Johns. J. R.	Johnson's Reports,
Dal.	Dalison.	Ch. R. Cas.	Chancery Reports, Cases in Error.
Dan. Ord.	Danish Ordinances.	Jus.	Justinianus.
Dods.	Dodson.	Kel.	Keligney.
Dy.	Dyer.	Keil.	Keilway.
E. R.	East's Reports.	Kir.	Kirby.
E. P. C. & C.		Leon.	Leonard.
R.	East's Crown Law.	Lev.	Leving.
Esp. N. P.	Espinasse Nisi Prius.	Lew.	Lewin.
Eq. Ca. Abr.	Equity Cases Abridged.	L. & Leg.	Law.
Ev.	Evidence.	Lib. & b.	Book.
Emer. Ass.	Emerigon Assurance.	Lil.	Lilly.
Fess.	Fessenden.	Liv.	Livermore.
Fonb.	Fonblanque.	Lut.	Lutwyche.
Fortes.	Fortescue.	Locc.	Loccenius.
Fost.	Foster.	Litt.	Littell.
Fran.	Francis.	Lou.	Louisiana.
Freem.	Freeman.	Le. C. C.	Leach Crown Cases.
Fair.	Fairfield.	Mar. N. R.	Martin's North Carolina Reports.
F. N. B.	Fitz Herbert Natural Brevium.	Mar. Lou. R.	Martin's Louisiana Reports, New Series.
Gall. R.	Gallison's Reports.	N. S.	
Gibb.	Gibbert.	Mar. & Yer.	Martin & Yerger.
Golds.	Goldsborough.	Mar. on Bills.	Marius.
Greenlf.	Greenleaf.	Marsh.	Marshall.
Gro.	Grotius.	Mass.	Massachusetts.
Har. & Gill.	Harris & Gill.	Mun.	Munford.
Hals.	Halstead.	Mos.	Moseley.
Hamm.	Hammond.	Madd.	Maddock.
Hayw.	Haywood.	Mer.	Merivale.
Hen. & Mun.	Henning & Munford.	M. & S.	Maule & Selwyn.
H. P. C.	Hale's Pleas for the Crown.	M. & Ry.	Manning & Ryland.

M. & Mal.	Moody & Malkin.	Shep. R.	Shepley's Reports.
Moll.	Molloy.	Stew. & P.	Stewart & Porter.
M. & P.	Moore & Payne.	South. R.	Southard's Report.
Mee & W.	Meeson & Welsby.	S. C. R.	South Carolina Re- port.
M. & Bli.	Montegu & Bligh.	Str.	Strange.
M. & Cr.	Mylne & Craig.	St. Tr.	State Trials.
M. & K.	Mylne & Keene.	Sch. & Lef.	Schoales & Lefroy.
M. & R.	Moody & Robinson.	Stark. N. P.	Starkie Nisi Prius.
Mol. Jur. Mar.	Molloy Jura Maritima.	Swanst.	Swanstown.
Mur. R.	Murphy's Reports.	Sh. & Mac.	Shaw & Maclean.
Mod. R.	Modern Reports.	Sa. & Sc.	Sausse & Scully.
N. Hamp. R.	New Hampshire Re- ports.	Sid.	Sidenfern.
N. Y.	New York.	Sel.	Selden.
N. & Man.	Neville & Manning.	Salk.	Salkeld.
Nev. & P.	Neville & Perry.	Saun.	Saunders.
Ov. R.	Overton's Report.	Stev. & Ben.	Stevens & Benecke.
Penn.	Pennsylvania.	Sug.	Sugden.
Penn. R.	Pennington Report.	Shu.	Shuback's de Juralit- toris.
Pet.	Peters.	Taunt.	Taunton.
Petersd. Abr.	Petersdorff's Abridg- ment.	Talb.	Talbot.
Pick.	Pickering.	Ty.-	Tyler.
Plow.	Plowden.	Vat.	Vattel.
Poth.	Pothier.	Vent.	Ventus.
Ran. R.	Randolph Report.	Vern.	Vernon.
Raym.	Raymond.	Verp.	Verplank.
Rob. Adm. R.	Robinson's Admiralty Reports.	Ves.	Vesey.
Ros.	Roscoe.	Vin. Abr.	Viner's Abridgment.
Runn.	Runnington.	Verw.	Verwer.
Russ. C. C.	Russell's Crown Cases.	Wash.	Washington.
R. & Ry.	Russell & Ryan.	Wend.	Wendell.
R. & M.	Russell & Mylne.	Weyt.	Weytsen.
Rho. L.	Rhodian Law.	Wisb.	Wisbuy.
Rott. Ord.	Rotterdam Ordinance.	Went.	Wentworth.
Ril. Col. C.	Riley's Collection Ca- ses.	Whar.	Wharton.
Ruff. R.	Ruffin Report.	Wesk.	Weskett.
Sim. & Stu.	Simons & Stuart.	Wheat.	Wheaton.
S. & R. R.	Sergeant & Rawle's Report.	Yelv.	Yelverton.
		Yer.	Yergen.
		Yo. & Co.	Young & Collyer.
		Y. & J.	Young & Jervis..

QUESTIONS AND ANSWERS

ON

L A W.

ABATEMENT.

1. What is abatement ?

Abatement in its present most general signification, relates to writs or plaints ; and means, the quashing or destroying the plaintiff's writ or plaint.

A plea in abatément, is a plea put in by the defendant, in which he shows cause to the court why he should not be impleaded or sued ; or if impleaded, not in the manner and form he then is : therefore praying that the writ or plaint may abate ; that is, that the suit of the plaintiff may for that time cease.—1 *Inst.* 134. *b.* 277. *F. N. B.* 115. *Gilb. H. C. D.* 186. *Terms de Ley.* 1 *Chitty on Pleading*, vol. 1. Or thus, abatement is a term having several meanings.

The most general, is its application to a plea which goes to show that the plaintiff cannot recover in that form of action. Its appropriate use is :

1. When the court have no jurisdiction.

2. When the plaintiff has no right to prosecute ; as in actions for wrongs when too few or too many have joined in the action.

3. When real parties to a contract are not all joined as defendants.

In the last case, the plea must state who are the real parties.

Two very inconvenient results arise from omitting to plead this plea in the last case mentioned, viz.

1. The defendants proceeded against must answer to the plaintiff for the whole amount recovered.

2. They cannot recover of their co-contractors the proportion they should pay of the amount, because it was in their power to have made them co-defendants.

2. Must the plea be verified by affidavit ?

It must.

ACCORD AND SATISFACTION.

1. What is accord?

Accord is an agreement between two or more persons, where any one is injured by a trespass or offence done, or on a contract, to satisfy him with some recompense; which accord if executed and performed, shall be a good bar in law, if the other party, after the accord performed, bring an action for the same trespass, &c.—*Terms de Ley*.

An accord and satisfaction to be sufficient, must be in full satisfaction. It must be certain.

It must be executed, not executory.

The receipt of a less sum in satisfaction of a larger sum extinguishes it.

The acceptance of security for a less sum in satisfaction of a larger sum, is an extinguishment.—20 *Johnson*, 76.

A mere agreement to receive a less sum in satisfaction of a larger, is no extinguishment. It is an agreement without consideration, and therefore invalid.

The acceptance of a promissory note, or other negotiable instrument, on account of a debt, is a satisfaction.

The promissory note of a member of a firm received in payment of a firm debt, is a discharge of it.

Unless however, it be received in payment, it is no discharge until paid. Negotiable securities so given, should be receipted to be in full when paid.

ACTION.

1. If A agree under seal to do certain work for B and does part, but is prevented by B from finishing it according to contract, A cannot maintain a *quantum meruit* against B for the work actually performed; but must sue upon the sealed instrument.—*Young v. Preston*, 2 *Cond. Rep.* 98.

Wherever a man may have an action on a sealed instrument, he is bound to resort to it.—*Ibid*.

2. Is a several suit and judgment against one of two makers of a promissory note, a bar to a joint action against both upon the same note?

It is not.—*Sheely v. Mandeville, et al.*, *ibid*. 362.

3. Is the whole of a joint note merged in a judgment against one of the makers on his individual *assumpsit*?

It is not; but the other may be charged in a subsequent joint-action, if he pleads severally.—*Ibid*.

Upon a sale of land, at auction, if the terms be that the purchaser shall within thirty days give his notes with two good endorsers, and if he shall fail to comply within the thirty days, then the lands to be resold on

account of the first purchaser, the vendor cannot maintain an action against the vendee for a breach of the contract, until a re-sale shall have ascertained the deficit, although the vendee should instruct an attorney to draw a deed, and insert his name as purchaser.—*Webster and Ford v. Hoban*, 2 Cond. Rep. 546.

4. Can an action be maintained on a final decree in chancery, rendered against an individual after his death, though founded upon an interlocutory decree, made during his lifetime ?

It cannot.—*Walker's Reports*, 30.

An action for damage, lies against a sheriff if a slave sold for less money, on account of any neglect of the sheriff to perform his duty.—*Walker's Reports*, 293.

5. In an action on the case for conspiracy as well as in the action for malicious prosecution, is an averment in the declaration that the prosecution was false and malicious, sufficient ?

It is not ; but it must be averred to have been *without probable cause*.—*Kirtly v. Deck*, 2 Mumford's Rep. 10.

6. In an action of *general indebitatus assumpsit* for services rendered, as an overseer, or of *quantum meruit* for like services, can the plaintiff give in evidence proof that the defendant had employed him as an overseer, and was to pay him a certain quantity of tobacco ?

He cannot ; in such case he should declare upon the *special agreement*.—*Brook v. Scott's Exrs.*, 2 Mumford's Rep. 344.

7. Can money levied by the sheriff upon a judgment, which is afterwards reversed, be recovered back by *general indebitatus assumpsit* for money had and received ?

It cannot, without proof that the money was actually received by the plaintiff, or applied to his use.—*Isom v. Johns.*, *ibid.* 272.

The first section of the acts to reform the practice of the district county and corporation courts which took effect the first of April, 1805, applies to suits instituted after that day, though upon writings of a previous date.—*Wallace and others v. Baker*, *ibid.* 334.

ADMIRALTY JURISDICTION.

In all proceedings *in rem*, the court has a right to order the thing to be taken into custody of the law ; and it is to be presumed to be in the custody of the law, unless the contrary appears.—*Jennings v. Carson*, 2 Cond. Rep. 2.

Although the claims of a state be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction.—*The United States v. Judge Peters*, *ibid.* 202.

1. In admiralty cases, does an appeal suspend the sentence altogether?

It does; and the cause is to be heard in the appellate court as if no sentence had been pronounced.—*Yeaton v. The United States, ibid.* 256.

2. In cases of admiralty jurisdiction, will new evidence be admitted in this court?

It will; and for that purpose a commission may issue.—*Brig James Wells v. The United States, ibid.* 402.

3. Will this court grant a commission to take new evidence to be used here, in case of admiralty jurisdiction?

It will.—*Hawthorne, &c. v. The United States, ibid.* 434.

4. Are cases of seizure upon waters navigable from the sea, by vessels of more than ten tons burthen, for breach of the laws of the United States, civil cases of admiralty and maritime jurisdiction?

They are; and are to be tried without a jury.—*Wheeler v. The United States, ibid.* 437.

5. In a libel is it necessary to state any facts which constitutes the defence of the claimant?

It is not.—*The Cargo of the Brig Aurora, &c. v. The United States, ibid.* 540.

6. What must an information in the admiralty for a forfeiture contain?

It must contain a substantial statement of the offence. A general reference to the provisions of the statute is not sufficient. If the information be defective in that respect, the defect is not cured by evidence of the facts, omitted to be averred in the information.—*The Schooner Hoppet, &c. v. The United States, ibid.* 542.

In all proceedings *in rem*, on appeal, the property follows the cause into the circuit court, and is subject to the disposition of that court; but it does not follow the cause into the supreme court, on an appeal to that court.—*The Collector, 6 Wheat.* 194.

7. After an appeal from the district to the circuit court, can the former court make an order respecting the property?

It cannot; whether it has been sold and the proceeds paid into the court, or whether it remains specifically; or, its proceeds remain in the hands of the marshal.—*Ibid.*

Cases in the courts of the United States, as to what will be deemed probable causes of capture and detention, to excuse capture, detention, and proceedings.

8. If the commander of a public armed vessel seizes and sends in for adjudication, a vessel for violation of a statute, will he be liable for damages?

He will, unless there is a reasonable cause of suspicion.—*Murray v. Charming Betsy*, 2 *Cranch*, 64, 1 *Cond. Rep.* 385.

Probable cause means less than evidence which would justify condemnation; it imports a seizure made under circumstances which warrant suspicion.—*Lock v. United States*, 7 *Cranch*, 339.

Although probable cause of seizure will not exempt from costs and damages, in seizure under mere municipal statutes, unless expressly made so by the law itself, this principle does not extend to captures *juri belli*, nor to maritime ports generally, nor to the acts of Congress authorizing the exercise of belligerent rights to a limited extent; such as the piracy act of March 3d, 1819, c. 487, and May 15th, 1820, c. 631.—*The Palmyra*, 12 *Wheat.* 1.

9. Is a probable cause sufficient cause for a capture?

It is; but such protection may be forfeited by subsequent misconduct or negligence.—*The George*, 1 *Mason*, 24.

There can be no doubt that where there is *prima facie* evidence to condemn, or so much question and difficulty as to require further proof, the captors are completely justified; but these are not the only tests of a probable cause for the capture.—*Ibid.*

10. When a seizer shows probable cause, does he become a *bona fide* possessor?

He does; and is not responsible for the consequences that may result; but where the seizure is wholly without excuse, he is liable for damages which ensue from the seizure.—*Shattuck v. Malley*, 1 *Wash. C. R.* 245

AFFIDAVIT.

1. What is an affidavit?

An affidavit is an oath in writing; and to make affidavit of a thing, is to testify it upon oath. An affidavit, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such an oath; and the true place of habitation, and true addition of every person who shall make an affidavit, is to be inserted in his affidavit.—1 *Lill. Ab.* 44, 46.

Affidavits ought to set forth the matter of fact only, which the party intends to prove by his affidavits; and not to declare the merits of the cause of which the court is judge, 21 *Car.* 1 *B. R.* The plaintiff or defendant (having authority to take affidavits) may take affidavits in a cause depending; yet it will not be admitted in evidence at the trial, but only upon motion.—1 *Lill.* 44.

Where a bill requires an affidavit to some parts and not to others, a demurrer to the whole for the want of an affidavit is bad.—2 *New York cases in Error*, 344.

AGREEMENT.

An agreement by the President and Cashier of the Bank of the United States, that the endorser of a promissory note shall not be liable on his endorsement, does not bind the Bank. It is not the duty of the Cashier and President to make such contracts; nor have they power to bind the Bank, except in discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money.—*Bank of the United States v. Dunn*. 6 *Peter's Rep.* 51.

1. Is a contract of sale considered in equity as binding on the parties, by the execution of a bond for the purchase money?

1. It is not, if it appear that the seller failed to perform what was to be done on his part, in order to consummate the contract.—*Page's Exr. v. Winston's Admr.*, 2 *Mumford's Rep.* 298.

A father-in-law having promised his son-in-law, that if he would purchase a certain tract of land he would assist him in paying for it, by letting him have the amount of a particular bond, when collected, and the son-in-law having thereupon made the purchase, this promise was determined to be upon sufficient consideration, and obligatory in law.—*Scots' Ex'rs. v. Osborne's Ex'rs.*, *Ibid.* 413. And since his claim did not accrue before such collection, the act of limitations did not begin to run against him until then.—*Ibid.*

ALIEN.

1. Who is an alien?

Generally speaking one born in a foreign country, out of the allegiance of the king.—*Jac. Dic. tit. Alien.*

Under the laws of New York, one citizen of the State cannot inherit in the collateral line to the others, when he must make his pedigree or title, through a deceased alien ancestor.—*Lessee of Levy v. McCartee*, 102.

That an alien has no inheritable blood and can neither take land himself by descent, or transmit land from himself to others by descent, is common learning.—*Ibid.*

The case of *Collingwood v. Pace*, 1 *Ventris's Rep.* 413, furnishes conclusive evidence that by the common law, in all cases of mediate descents, if any mediate ancestor through whom the party makes his pedigree as heir is an alien, that is a bar to his title as heir.—*Ibid.*

2. Have the courts of the United States jurisdiction in a case where both parties are aliens?

They have not.—*Montalet v. Murray*. 2 *Con. Rep. of the Supreme Court of the United States* 19.

3. Can an alien take lands by purchase ?

He can, though not by descent, at the common law ; or in other words he cannot take it by the act of law, but he may by the act of party.—*Fairfax's Devisee v. Hunter's Lessee, ibid.* 622.

4. Is there any distinction, whether the purchase be by grant or devise ?

There is not ; in either case the estate vests in the alien, not for his own benefit, but for the benefit of the state. Or in the language of the ancient law, he has the capacity to take but not to hold lands ; and they may be seized into the hands of the sovereign.—*Ibid.*

In respect to these general rights and disabilities, as to real property, there is no difference between alien friends and alien enemies.—*Ibid.*

During war, the property of alien enemies is subject to confiscation *jure belli*, and the capacity to sue is suspended.—*Ibid.*

When is the title acquired by an alien by purchase divested ?

Not until office found, the principle is founded upon the ground, that as the freehold is in the alien, and he is tenant to the lord of whom the lands are holden, it cannot be divested out of him, but by some notorious act, by which it may appear that the freehold is in another.—*Ibid.*

Until the king be in possession by office found, he cannot grant lands which are forfeited by alienage.—*Ibid.*

AMENDMENT.

1. What is amendment ?

It is the correction of an error committed in any process, which may be amended after judgment ; if there be any error in giving judgment, the party is driven to his writ of error ; though where the fault appears to be in the clerk who wrote the record, it may be amended.—*Terms de Ley*, 39.

APPEAL.

The thing does not follow the appeal into the Supreme Court, but remains in the court below ; which has a right to order it to be sold, if perishable, notwithstanding the appeal.—*Jennings v. Carson*, 2 *Cond. Rep. of the Supreme Court of the United States*, 2.

1. If two citizens of the same State, in a suit in a court of their State, claim title under the same act of Congress, has this court an appellate jurisdiction to revise and correct the judgment of that court in such case ?

It has.—*Matthews v. Zane, ibid.* 149.

In admiralty cases, an appeal suspends the sentence altogether ; and the cause is to be heard in the appellate court as if no sentence had been pronounced.—*Yeaton et al. v. The United States, ibid.* 256.

2. If the law under which the sentence of condemnation was pronounced, be repealed after sentence in the court below, and before final sentence in the appellate court, can sentence of condemnation be pronounced?

It cannot; unless some special provision be made for that purpose by statute.—*Ibid.*

3. Is it too late to allege as error, in the appellate court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below?

It is not.—*Slocum v. Pomery, ibid.* 351.

An appeal lies to the Supreme Court from an order of the circuit court of the district of Columbia, quashing an inquisition in the nature of a writ *ad quod damnum*.—*Curtis v. The Georgetown and Alexandria Turnpike Company, ibid.* 354.

APPROPRIATION.

1. If the debtor at the time of payment does not direct to which account the payment shall be applied, may the creditor at any time apply it to which he pleases?

He may.—*The Mayor and Commonalty of Alexandria v. Patten et al. 2 Cond. Rep.* 122.

2. If neither the debtor nor the creditor has made the application of the payments, to what debts will the court apply them?

To the debts for which the security is most precarious.—*Field et al. v. Holland et al. ibid.* 285.

When a collector of revenue has given two bonds for his official conduct at different periods, and with different sureties; a promise by the supervisor to apply his payments exclusively to the discharge of the first bond, although some of the payments were for money collected and paid after the second bond was given, does not bind the United States, and does not amount to an application of the payments to the first bond.—*The United States v. January & Patterson, ibid.* 611.

The debtor has the option, if he thinks fit to exercise it, and may direct the application of any particular payment at the time of making it; if he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application.—*Ibid.*

A debtor of the United States, who puts evidence of debts due to himself into the hands of a public officer of the United States, to collect and apply the money, when received to the credit of such debtor in account with the United States, is not entitled to such credit until the money gets into the hands of a public officer of the United States, entitled to receive it. Its being in the hands of an agent of a person, who at the time when the claims were put into his hands for collection, was a public offi-

cer of the United States, entitled to receive debts due to the United States, but whose office became extinct before the money was received by his agent, is not sufficient to entitle such debtor to a credit in account with the United States.—*United States v. Patterson, ibid.*

AGENT.

HOW CREATED.

How may the authority of agent be created ?

It may be created by deed or writing, or verbally without writings, and for the ordinary purposes of business and commerce, the latter is sufficient.—2 *Kent*, 477.

2. How may the agency be inferred ?

From the relation of the parties and the nature of the employment without proof of any express appointment.—15 *East*, 400.

3. Where a person sends his servant to a shopkeeper for goods on credit, and afterwards pays for them, is he liable to the same shopkeeper for goods subsequently delivered to the same servant for him ?

He is ; although he had sent the money to pay for them, which the servant had embezzled.—1 *Stra.* 506.

4. Where a person has been in the habit of drawing bills on another, which have been accepted and paid, is an authority for that purpose inferred ?

It is ; and when one person subscribes a policy of insurance with the name of another, proof of his having done it, in many instances, is sufficient to charge him in whose name it is subscribed, without producing any power of attorney.—1 *Esp.* 61.

5. When the principal is informed of what has been done, must he dissent ?

He must ; and give notice of it in a reasonable time, and if he does not, his assent and ratification will be presumed.—2 *Kent*, 480.

A person, however, cannot create himself agent without authority and if A. owe a debt to B., and C. pays it, without any request or authority from A., he cannot recover against A., the money so paid for his benefit.—8 *Term Rep.* 310.

6. May a surety pay the debt of his principal to relieve himself ?

He may ; and recover the amount of his principal.—8 *Term Rep.* 308.

7. If the principal is not bound by the agent's contract is a subsequent promise to be answerable, enforceable?

It is not.—3 *Term Rep.* 757.

8. Is a principal answerable for the act of his agent in concealing and suppressing deeds?

He is; though not done with the knowledge of the principal.—*Sch. & Sef.* 209, 222.

9. Does the principal adopt the acts of another, by permitting him to hold himself out to the world as his agent?

He does, and will be held bound to the person who gives credit thereafter to the other, in the capacity of his agent.—2 *Kent*, 614.

10. Would the Roman law oblige a person to indemnify an assumed agent, acting without authority, and without assent or acquiescence given to the act?

It would—provided it was an act necessary and useful at its commencement.—*Dig.* 3, 5, 46. The *negotium gestio*, according to the civilians, is a species of spontaneous factory, or an interference by one in the affairs of another, in his absence, from benevolence or friendship, and without authority. He acquires no rights of property by means of the interference, and he is strictly bound, not only to good faith, but to ordinary care and diligence; and in some cases, he is held responsible for the slightest neglect.—*Jones on Bailment*, 37. 1 *Bell's Comm.* 269. *Pothier App. du quasi Contrat Negotium gestorum.*

11. Has the English law ever gone to that extent?

It has not; and therefore if A. owes a debt to B., and C. chooses to pay it without authority, the law will not raise a promise in A. to indemnify C.; if that were so, it would be in the power of C. to make A. his debtor, *nolens volens*.—*Lord Kenyon*, 8 *Term Rep.* 310. *Story J. 5 Mason's Rep.* 400.

12. In what case may a payment, without authority, be binding on the party for whose use it was made?

If there were any relation between the parties it may be binding, or if it be made under the pressure of a situation in which one party was involved by the other's breach of faith.—2 *Kent*, 617.

13. Will not the extent of the authority given to an agent be sometimes enlarged, or varied, on the ground of implied authority?

It will, according to the pressure of circumstances, connected with the business with which he is entrusted.—5 *Day's Rep.* 556.

14. Is an acquiescence in the assumed agency of another, equivalent to an express authority?

It is, when the acts of the agent are brought home to the knowledge of the principal.—2 *Kent*, 614.

15. May a corporation appoint an attorney, upon record, without the common seal?

It may.—*Mayor of Thetford's case* per *Holt*, 1 *Salkeld*, 192.

16. Must the wife, in the absence of her husband, be considered as having a general authority to exercise usual and ordinary control over the property of the latter?

She must, unless it be expressly shown that he had constituted some other person to be his agent for that purpose.—*Lawrence v. Hunt*, 10 *Wendell*, 80.

17. When only is a person, in making a contract, to be considered as agent for another?

Only when he stipulates for his principal by name, stating his agency in the instrument which he signs; and whatever authority in right he may have to bind his principal, unless he professes to act by procuration, and signs as agent or attorney, he binds himself and no other person.—*Stackpole v. Arnold*, 11 *Mass. Rep.* 29. *Arfridson v. Ladd*, 12 *Mass. Rep.* 137.

18. Is a banker to be considered as agent of his customer?

He is. If property of the customer come into his hands to be dealt with in a particular manner, he is, as to that property the factor of the customer, having the right and liabilities of that character. Bills no due, paid in by a customer to his banker, are in the absence of evidence to the contrary, presumed to be placed with him as an agent, to procure the payment of them when due, and in such case the property remains in the customer.—*Giles v. Perkins*, 9 *East*, 12.

19. Can an implied authority have place where there is an express authority in writing?

Not in general. The nature and extent of the authority must in that case be gathered from the written instrument alone. To be sure, if the principal directly adopt the act, it may then be considered as his act, and there will be no need to have recourse to the terms of the appointment.

But in the case cited, the admission merely went to this; that the debt in respect of which the acceptance was given, was a just debt, and ought to be paid; there was no recognition of an authority in the attorney, either specially to accept bills, or generally to make the executrix personally liable. That the terms of the power did not warrant such an act, will be seen on reading it, as it is set out at length in the report of *H. Bl.* 624.

20. May not an authority to accept, draw, or endorse a bill in another person's name be by parol?

It may. And the statute of Anne, which makes promissory notes assignable, speaks of such as are made and signed by any person, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually entrusted by him, her, or them, to sign such promissory notes; from which it may be inferred that the legislature looked rather to the fact of employment than to the manner in which the authority was constituted.—*Per Holt, C. J.*, 12 *Mod.* 564. *Paley*, P. 161.

21. Must not a contract to guaranty be in writing?

It must. But the authority of an agent to sign such contract may be proved by parol, or be inferred from the acts of the principal; or, if done without such authority, yet if it is made known to the principal and approved by him afterwards, such conduct will amount to a ratification on his part; and would be as binding on him as if made by virtue of a previous authority.—*Per Parker, C. J.*, 8 *Pick.* 59.

In *Frost v. Wood*, 2 *Com.* 23, where the principal agreed to be responsible for articles purchased for his use, held that the agent might sign the name of his principal to a note for money borrowed for that purpose.

OF THE POWERS AND DUTIES.

1. What must an agent who is intrusted with a general power exercise?

He must exercise a sound discretion, and he has all the implied powers which are within the scope of the employment.—2 *Kent*, 617.

2. What does a power to settle an account imply?

It implies the right to allow payments already made.—2 *Kent*, 617.

3. If one be an empowered agent in a particular transaction, is he bound to go on and do all the other things connected with, or arising out of, that case?

He is not. For the principal is presumed to have his attention awakened to every thing not within the special charge.—*Dubreuil v. Rouzan*, 13 *Martin's Lous. Rep.* 158. *Hodge v. Dunford*, *ibid.* 100.

But the *negotium gestor* of the civil law, who interferes where the interest of his principal does not positively require it, must do every thing necessarily dependant on the business he commences, though not within the order or knowledge of the person for whom it was transacted.

4. What if the agent's powers are special and limited?

Then he must, strictly follow them.—2 *Kent*, 618.

5 Do the acts of an agent derive their validity from professing on the face of them, to have been done in the exercise of the agency?

They do not.—5 *Wheaton*, 326. 2 *Condensed Rep.* 533.

6. If A. authorizes B. to buy an estate for him at fifty dollars per acre, and he gives fifty-one dollars an acre, is A. bound to pay that price?

He is not. But the better opinion is, that if B. offers to pay the excess out of his own pocket, A. is then bound to take the estate.—2 *Kent*, 618.

7. How is this held in the civil law?

It is stated as the most equitable conclusion among the civilians, that A. is bound to take the estate at the price he prescribed.—*Majori Summæ minor. inest. Inst.* 3, 27–8, *Ferriere, sur Inst. H. T. Pothier, Traite du contrat de Mandat*, No. 94, 96.

8. If a power be given to buy a house, with an adjoining wharf and store, and the agent buys the house only, would the principal be bound to take the house?

He would not; for the inducement to the purchase has failed.—2 *Kent*, 619.

9. What if an agent has a power to lease for twenty-one years, and he leases for twenty-six years?

The lease in equity, would be void only for the excess; the line or distinction between the good execution of the power and the excess, can be easily made.

But, at law, even such a case would not be good *pro tanto*, or for the twenty-one years, according to a late English decision in the K. B.—*Sir Thomas Clarke, in Alexander v. Alexander*, 2 *Ves.* 644. *Campbell v. Leach*, *Amb. Rep.* 740. *Sugdon on Powers*, 545, 2 *Kent*, 619.

10. What if an agent does a different business from that he was authorized to do?

Then the principal is not bound, though it might even be more advantageous to him.—2 *Kent*, 620.

11. Is there not a very important distinction on this subject of the powers of an agent, between a general agent and one appointed for a special purpose?

There is. The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, will bind his principal so long as he keeps within the scope of his general authority, though he may act contrary to his private instructions. And the rule is necessary to prevent fraud, and encourage dealing.—2 *Kent*, 620.

But an agent, constituted for a particular purpose, and under a limited power, cannot bind his principal, if he exceeds his power—*Munn v. Commission Company*, 15 *Johns. Rep.* 44. *Beals v. Allen*, 18 *Ibid.* 363. *Thompson v. Stewart*, 3 *Com. Rep.* 172. *Lord Loughborough*, in *Howard v. Baillie*, 2 *H. Bla. Rep.* 618. *Andrews v. Kneeland*, 6 *Cowen's Rep.* 324. *Buller, J.*, 3 *Term Rep.* 762. *East India Company v. Hensley*, 1 *Esp. Rep.* 111. *Allen v. Ogden*, *Wharton's Dig. tit. Agent and Factor*, A. 1. *Blane v. Proudfit*, 3 *Call Rep.* 207.

The special authority must be strictly pursued ; and whoever deals with an agent, constituted for a special purpose, deals at his peril, when he passes the precise limits of his power.—2 *Kent*, 621.

12. Is there not then some risk attached to dealing with an agent ?

There is, when the agent passes the precise limits of his power. Thus where the holder of a bill of exchange desired A. to get it discounted, but positively refused to endorse it, and A. procured it to be endorsed by B.; it was held that the original owner was not bound by the act of A., who was a special agent, under a limited authority, not to endorse the bill.

So in the case of *Batty v. Carswell*, A. authorized B. to sign his name to a note for two hundred and fifty dollars, payable in six months, and he signed one payable in sixty days ; and the court held, that A. was not liable, because the special authority was not strictly pursued.—2 *Kent*, 621. 2 *Johns. Rep.* 48.

13. If the servant of a horse-dealer, who sells for him, but with express instructions not to warrant as to soundness, and he does warrant, is the master to be bound ?

He is ; because the servant, having a general authority to sell, acted within the general scope of his authority, and the public cannot be supposed to be acquainted with the private conversations between the master and servant.—*Ashhurst, J. in Term Rep.* 757. *Bailey, J. in 15 East's Rep.* 45.

So, if a broker, whose business it is to buy and sell goods in his own name, be entrusted by a merchant with the possession and apparent control of his goods, it is an implied authority to sell, and the principal will be concluded by the sale. There would be no safety in mercantile dealings if it were not so.—2 *Kent*, 621.

14. If a person intrusts his watch, to a watchmaker, to be repaired, would the owner be bound by his sale ?

He would not. The watchmaker is not exhibited to the world as owner, and credit is not given to him as such, merely because he has possession of the watch.—*Lord Ellenborough*, 15 *East's Rep.* 2 *Kent*, 622.

May a factor or merchant, who buys or sells upon commission, or as

an agent, for others, for a certain allowance, sell on credit, without any special authority for that purpose ?

He may, without incurring risk ; provided he be not restrained by his instructions, and does not unreasonably extend the term of credit : and provided he uses due diligence to ascertain the solvency of the purchaser.—6 *John. Rep.* 69.

But he cannot sell on credit, in a case in which it is not the usage.—1 *Camp. N. P. Rep.* 258.

Though payment to a factor, of goods sold by him be good, the principal may control the collection and sue for the price in his own name, or for damages for non-performance of the contract.—*Serg. & Rawl.* 19.

16. Are there any cases in which a factor sells on credit at his own risk ?

There are ; when he acts under what is called a *del credere* commission, for an additional premium ; he becomes liable to his principal when the purchase money falls due ; for he is substituted for the purchaser, and is bound to pay, not conditionally, but absolutely, and in the first instance.—2 *Kent*, 487. 1 *Term Rep.* 112.

17. What is a factor under a *del credere* commission ?

He is guarantor of the sale ; as between himself and the vendee, he is to be considered as the sole owner of the goods ; and he is surety to the principal.

An agent is a *nomen generalissimum*, and includes factors and brokers, who are only a special class of agents. A factor is distinguished from a broker by being intrusted by others with the possession and apparent ownership of property, and he is generally the correspondent of a foreign house. A broker is employed merely in the negotiation of mercantile contracts.—*Van Allen v. Vanderpool*, 6 *Johns. Rep.* 69. *Goodenow v. Tyler*, 7 *Mass. Rep.* 36. *James & Shoemaker v. M'Credie*, 1 *Bays' S. C. Rep.* 294. *Emery v. Gerbier*, and other cases, cited in *Wharton's Dig. of Penn. Rep. tit. Agent and Factor*, A. 2. *Burrill v. Phillips*, 1 *Gall. Rep.* 360. *Willes, Ch. J.*, in *Scott v. Surman*, *Willes' Rep.* 400. *Chambre, J.* in *Houghton v. Mathews*, 3 *Bos. & Pull.* 489. *Leverick v. Meigs*, 1 *Cowen's Rep.* 645. *Greenly v. Bartlett*, 1 *Greenleaf's Rep.* 172. 2 *Kent*, 622.

18. Can the factor sell on credit in a case in which it is not the usage, as the sale of stocks ?

He cannot, unless he be expressly authorized ; because this would be to sell in an unusual manner.—*Wiltshire v. Sims*, 1 *Camp. N. P. Rep.* 258

19. Can he bind his principal to other modes of payment, than a payment in money at the time of the sale, or on the usual credit ?

He cannot.—2 *Kent*, 623.

20. What if a factor, at the expiration of the credit given on a sale, takes a note payable to himself at a future day?

Then he makes the debt his own.—*Hosmer v. Beebe*, 14 *Martin's Louis. Rep.* 368.

21. Can he bind his principal to allow a set-off, on the part of the purchaser?

He cannot.—*Guy v. Oakley*, 13 *Johns. Rep.* 332.

22. What if the factor should barter the goods of his principal?

No property passes by that act, any more than in the case of pledging them, and the owner may sue the innocent purchaser, in trover.—*Guerreio v. Peile*, 3 *Burnw. & Ald.* 616

23. Is it not beyond the scope of the factor's power, to pledge the goods of the principal?

It is; and every attempt to do it, under color of a sale, is tortious and void. If the pawnee will call for the letter of advice, or make due inquiry as to the source from whence the goods came, he can discover (say the cases) that the possessor held the goods as factor, and not as vendee; and he is bound to know, at his peril, the extent of the factor's power.—*Patterson v. Tash*, 2 *Str. Rep.* 1178. *Daubigny v. Duval*, 5 *Term Rep.* 604. *De Bouchout v. Goldsmid*, 5 *Ves.* 211. *M'Combie v. Davies*, 7 *East's Rep.* 5. *Martini v. Coles*, 1 *Maule & Selw.* 140. *Fielding v. Kymer*, 2 *Brod. and Bing.* 639. *Kinder v. Shaw*, 2 *Mass. Rep.* 398. *Van Amringe v. Peabody*, 1 *Mason's Rep.* 440. *Bouré v. Napier*, 1 *M'Cord's Rep.* 1.

There may be a question, in some instances, whether the *res gesta* amounted to a sale on the part of the factor, or was a mere deposit or pledge as collateral security for his debt.

But where it appears that the goods were really pledged, it is settled that it is an act beyond the authority of the factor, and the principal may look to the pawnee.—2 *Kent*, 626.

24. What exception is there to the rule, that a factor cannot pledge?

The case of negotiable paper; for there possession and property, go together, and carry with them a disposing power, and a factor may pledge the negotiable paper of his principal as a security for his own debt, and it will bind the principal, unless he can charge the party with notice of the fraud, or want of title in the agent.—2 *Kent*, 626. *Collins v. Martin*, 1 *Bos. & Pull.* 648. *Treuttel v. Barandon*, 8 *Taunt. Rep.* 100. *Goldsmid v. Gaden*, in *Chancery*, and cited in *Collins v. Martin*.

25. May a factor deliver the goods of his agent, to a third person, for his own security, with notice of his lien, and as his agent, to keep possession for him?

He may. Such a change in the lien does not divest the factor of his right, for it is, in effect, a continuance of the factor's possession.—*M'Combie v. Davies*, 7 *East Rep.* 5. *Urquhart v. M'Iver*, 4 *Johns. Rep.* 103.

26. Are not agents, auctioneers, and trustees, in certain cases, disqualified from purchasing property themselves?

They are; because their confidential employment might enable them to conceal information in order to promote their own particular interests.

No man can serve two masters. He that is entrusted with the business of others, cannot be allowed to make the business an object of interest to himself; for the frailty of nature will not admit of impartiality, when a person is both judge and party; or sustains the two characters of seller and buyer.—*Hammond on Principal and Agent*, 219.

A fundamental rule applicable to both seller and purchaser, is, that an agent employed to sell cannot make himself the purchaser.—*Lowther v. Lowther*, 13 *Ves.* 103. By 31 Geo. 2, c. 40, § 11, salesmen, brokers, or factors, employed to buy or sell cattle in London, are prohibited from buying or selling on their own account, under penalty of double their value. Nor if an agent be employed to purchase can he himself be the seller. A memorandum of the sale of goods under the 29 Car. 2, c. 3, § 17, cannot be signed by one of the contracting parties as the authorized agent of the other, but the agent must be a third person.—*Wright v. Dannah*, 2 *Campb.* 203.

27. May persons who are disqualified from acting in their own capacity, as infants and femes coverts, be agents for others?

They may.—*Co. Lit.* 52. n. 1 *Esp. Cas.* 142. *Emerson v. Plonden*, 2 *Esp. Cas.* 511. *Palethorpe v. Furnish*, 2 *Stark. Cas. N. P.* 204. *Anderson v. Sanderson*.

28. What is the primary obligation of an agent, whose authority is limited by instructions?

It is faithfully to adhere to those instructions. And it will be presumed where the facts do not negative such presumption, that an agent who is entrusted to execute a particular authority, has done every thing requisite for the completion of it.—*Boville v. Bradury*, 2 *Starkie, N. P. C.* 136.

29. If loss ensue, does it furnish any defence to the agent, that he intended the benefit of his principal?

It does not; *Beawes' Lex Merc.* 41. 43. *Maloyne*, 154. And on the other hand if he thereby obtain an advantage, or make a profit, he will not be allowed to retain it, but must account to his principal for the whole, notwithstanding he bore the risk of failure.—*Beawes*, 41. 2 *Wills*, 325. *Russell v. Palmer*. 1 *H. Bl.* 171. *Shiel v. Blackburn*.

30. What is an agent bound to use in the execution of his trust?
The utmost diligence and care.---2 *Wills*, 325.

31. In the absence of specific instructions, what course is it his duty to pursue?

The accustomed course of that business in which he is employed. For an employer has undoubtedly a right to expect from an agent whom he pays for his service, that without any particular directions, every precaution ordinarily used for the safety and improvement of his property will be observed. And to this end, it is incumbent upon an agent, who receives compensation for his labor, to possess such a competent degree of skill and knowledge in his business, as would, in ordinary cases, be adequate to the accomplishment of the service undertaken.---2 *Wills*, 325. *Russell v. Palmer*.

32. Can the Cashier of a banking corporation transfer the property of a corporation in a note?

He cannot, without authority from them, or perhaps from the directors, pursuant to powers vested in them by the corporation; but he may endorse a promissory note, the property of the corporation, and do what is requisite to the recovery of payment of a note.

That authority is implied. But where the charter of a banking corporation had expired, and the President thereof endorsed notes to the plaintiffs; held, that as he had not *ex officio* the power to transfer their property or securities, a special authority to do it must be proved by legal evidence; and as the authority could only emanate from the stockholders or company, directly, or indirectly through the directors, to whom, by the by-laws was committed the management of the affairs of the bank, it must be proved by a vote of one or other of these bodies.---*Hartford Bank v. Barry*, 17 *Mass.* 94. *Hall & Augusta v. Hamlin et al.* 14 *ib.* 178.

33. Can a factor delegate his employment to another, so as to raise a privity between that other and his principal; or consequently to confer upon the person deputed as against the principal any right, whether of commission, repayment, or lien?

He cannot.---*Selly v. Rathbone*, 2 *M. & S.* 299. *Cockburn v. Irlam*, *ib.* 301. *Schmaling v. Tomlinson*, 6 *Taunt.* 147.

Neither can one, specially entrusted to sell, relieve himself from accounting to his principal, by devolving the trust upon another, though he have acted *bona fide* for the interest of the principal.---*Catlin v. Bell*, 4 *Camp.* 184.

34. Can an authority given to two, be executed by one?

It cannot.---*Co. Lit.* 112. *Ib.* and 1 *Com. Dig.* 141 & 145. If an authority be to A., B. and C., to sell after the death of D., and one die before D., the others cannot sell.---*Co. Lit.* 112. An authority to

three, jointly and separately, is not well executed by two.—*Co. Lit.* 181. 1 *Rol. Ab.* 329.

35. If an attorney has authority to convey lands, must he do it in the name of his principal?

He must. The conveyance must be the act of the principal, and not of the attorney; otherwise the conveyance is void. And it is not enough for the attorney in the form of the conveyance to declare that he does it as attorney; for being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name. Therefore in *Fowler v. Shearer*, 7 *Mass.* 14, where the plaintiff constituted his wife his attorney to make and execute any deed or deeds of land, and she conveyed to the defendant a parcel of land of which the plaintiff and wife were seised in her right in fee.

36. Does an authority to buy and sell goods necessarily include a power to sign notes, and other securities for the principal?

It does not.—12 *Mass. Rep.* 237.

37. Is an agent justified in departing from his instructions by the existence of a state of things not contemplated at the time when they were given?

He is.—4 *Binn.* 361.

He may also depart from written instructions, by verbal communications of a general agent of the principal.—3 *Cranch*, 415.

Where goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, and to re-deliver the residue unsold *on demand*; but until a demand has been made of an account, no action will lie for not accounting.—*Topham v. Braddick*, 1 *Taunt.* 572.

38. What has been laid as a rule in the court of chancery, not to be departed from but upon very special circumstances?

That an agent is bound to keep regular accounts of his transactions on behalf of his employer; not only upon his own part, accounts of payments, but also on the part of his employers, accounts of his receipts.—8 *Ves.* 361. *White v. Lady Lincoln*. *Morgan v. Lewis*, 4 *Dow's Rep.* 52.

Where an agent had for many years neglected to keep accounts, and had withheld part of his principal's money, an injunction was granted to restrain the transfer of the whole of certain stock, discovered to have been invested in his own name, till he should distinguish upon oath how much of it was bought with the money of his principal.—8 *Ves.* 48. *Lord Chedworth v. Edwards*, 15 *Ves.* 436. *Lupton v. White*. *Panton v. Panton*.

And this principle will be found to be established by many authorities as a settled rule of equity, that if an agent whose duty it is to keep

the property of his employer separate, mix it with his own, it lies upon him to distinguish them, and if he cannot distinguish what is his own, the whole is to be considered as belonging to others.

39. Can an agent sue on a simple contract expressed to have been made with him as such?

He cannot.—3 *B. & P.* 147.

40. Does not a power to sell lands, imply a power to bind the principal to convey with general warranty?

It does, unless there be restraining words.—*Vanada v. Hopkins*, 1 *C. J. Marsh*, 293.

41. Has an agent ordinarily, and without express authority, power to employ a sub-agent to do the business, without the knowledge or consent of his principal?

He has not.—2 *Kent*, 633.

42. What is the maxim in such cases?

That *Delegatus non potest delegare*, and the agency is generally a personal trust and confidence, which cannot be delegated; for the principal employs the agent, from the opinion which he has of his personal skill and integrity, and the latter has no right to turn over his principal to another, of whom he knows nothing.—*Combe's case*, 9 *Co.* 75. *Ingram v. Ingram*, 2 *Atk. Rep.* 88. *Attorney-General v. Beryman*, cited in 2 *Ves.* 643. *Solly v. Rathbone*, 2 *Maule & Selw.* 298. *Cockran v. Irlam*, *Ibid.* 303. *Schmaling v. Thomlinson*, 6 *Taunt. Rep.* 147. *Coles v. Trecothick*, 9 *Ves.* 234, 251.

43. Where goods have been sold, and the vendee pay money to the broker, on a general account, having purchased from him goods of different owners, can he upon failure of the broker, apply the whole to one demand?

He cannot; but it must be apportioned among the several principals; and he remains liable to each for the surplus, if the sum paid were not sufficient to cover all the demands.

But there is a distinction between the character of a factor and that of a broker. The latter when selling for a known principal has not in general authority to receive payment; and if payment be made to him, it is at the risk of the purchaser.—*Favene v. Bennet*, 11 *East*, 38. *Baring v. Corie*, 2 *B. & A.* 137.

44. Where a consignee of goods sells some of them on credit, and settles with the consignor, and pays him the full amount, can he afterwards claim to be reimbursed, for any part, on the ground of a bad debt made in the sale?

He cannot, in the absence of frauds or mistake in the settlement.—*Consequa v. Fanning, Idem, 600.*

45. Does a letter of attorney to sue for, receive, and recover a debt, authorize the attorney to arrest the debtor?

It does.—1 *Roll. Rep.* 390. *Palm.* 394.

46. Can a broker employed to get a policy effected, adjust the loss?

He may.—*Richardson v. Anderson, Campb.* 43. *N.*

47. Does an authority to receive and pay partnership debts, on a dissolution of partnership, give authority to accept or endorse bills in the joint names of the partners?

It does not.—*Kilgour v. Finlayson, 1 H. Bl.* 155.

48. Does a letter of attorney to receive all salary and money, with all the principal's authority to recover, compound, and discharge, and to give releases, and appoint substitutes, authorize the attorney to negotiate bills received in payment, or to endorse them in his own name?

It does not; and a general power to transact all business has no greater effect.—*Hogg v. Smith, 1 Taunt.* 347; and see *Hay v. Goldsmid*, there cited.

49. Where payment to an agent is tendered, is he not authorized to receive it?

He is; and a tender to him will have the same effect as a tender to the principal in person.—2 *B. & A.* 137. *Goodland v. Blewith, 1 Camp.* 447. See also *Muffat v. Parsons, 1 Marsh,* 55. 5 *Taunt.* 307. *S. C.*

50. May an agent who has a general authority to receive payments, which is a matter of evidence, without collusion receive them in what manner he chooses, so as to acquit the debtor?

He may, provided it be such as the course of trade warrants.—11 *Mod.* 88.

51. Where an agent has authority to receive payment, is not his receipt the receipt of the principal?

It is; but if he give a receipt without having in fact received the money, that is no bar to the principal; for it would not be a bar if given by the principal himself, upon proof of the actual non-payment.—*Beaumont v. Boulbee, 7 Ves. Jun.* 617. 11 *Mod.* 88. *Dr. & St.* 286.

Unless it be a release by an agent properly authorised to make releases, which must be by deed.—2 *P. Wms.* 295. *Ambl.* 269. *Fitch v. Sutton, 5 East,* 230.

52. Is it not a maxim, that if a factor sells goods for his principal, the action may be brought either in his own name, or in that of his principal?

It is; and in the latter case the principal has the benefit of the factor's evidence.---1 *Atk.* 248.

53. Can a person incapacitated to purchase in his own name, purchase in the name of another?

He cannot.---4 *Cowen*, 717

54. Is it in accordance with the general usage, where bills are remitted by a merchant to his factor to be converted into available funds, for the factor to mingle the property of the merchant with that of others, by selling the bills on credit, and taking a joint note, covering other sums than that stipulated to be paid for the bills?

It is. And if the parties to the note become insolvent before it is due, the factor will not be held responsible, in consequence of the mere act of taking such joint note, for the loss sustained by his employer.---2 *Ch. J. Marshall's Decisions, Broken Rep.* 350.

A factor sold bills of his principal to C. on a credit, and took in payment a note of previous date, having three months to run, drawn by A. and endorsed by B., who were in good credit at the time it was transferred by C. Held that the circumstances of the note being of previous date, and not endorsed by the purchaser of the bills, are not sufficient *per se* to outweigh the fact, that the drawer and endorser were in good credit at the time of the transaction.---*Ibid.*

55. What four things is an agent employed in negotiating bills of exchange, bound to do?

1. To endeavor to procure acceptance.
2. On refusal, to protest for non-acceptance.
3. To advise the remitter, of the receipt, acceptance, or protesting.
4. To advise any third person that is concerned; and all this without any delay.---*Beawes*, 431. See with respect to attorneys, 2 *Wills.* 325. 4 *Burr.* 2061. 3 *B. & C.* 799. And, as to auctioneers, see 3 *Campb.* 451.

56. Will an agent, without reward, be required to use more diligence than would be used by a provident man in the management of his own concerns?

He will not.---*Pate v. McClure*, 4 *Ran.* 164.

57. Is a consignee, who has made advances, justified in breaking up a voyage, and vacating a policy of insurance?

Under strong circumstances, he may be.---*Vermonet v. Delaire*, 2 *Desau*, 323.

58. Where the course of dealing between the principal and agent is such that the latter has been used to effect insurances by direction of the former, is he bound to comply with an order to insure?

He is; though he has no effects in hand at the time of receiving the order, unless notice has been previously given by him to discontinue that mode of dealing.---*Smith v. Lascelles*, 2 T. R. 189, *Beaves*, 43. But if he have effects in his hand, he cannot, in any case, refuse to comply with the order.---*Id. ib.*

59. Where several persons are chosen by a town, a committee to make a contract, and no authority given to one of them alone to contract, can the town be bound by the acts of a less number than the whole of them?

It cannot.---*Kupfer & all v. the Inhabitants of Augusta*, 12 Mass. Rep. 185.

60. Can a factor sell the property of his principal, to pay endorsements in the course of his factorage?

Not if he is indebted to the principal at the time. Nor can a factor buy up the debts of his principal at an under rate, and claim credit for their nominal amount; but in such a case he will only be allowed what he actually paid, although the purchase was made after the factorage had ceased, and the principal had brought a suit for an account.---*Alexander v. Morris*, 3 Call, 79.

61. In the absence of specific instructions, what course is it a factor's duty to pursue?

The accustomed course of that business in which he is employed. For an employer has undoubtedly a right to expect from an agent, whom he pays for his service, that without any particular directions every precaution ordinarily used for the safety and improvement of his property will be observed. And to this end it is incumbent upon an agent, who receives compensation for his labor, to possess such a competent degree of skill and knowledge in his business, as would in ordinary cases, be adequate to the accomplishment of the service undertaken.---2 Wills. 325. *Russell v. Palmer*.

62. Do the acts of an agent derive their validity from professing on the face of them, to have been done in the exercise of the agency?

They do not.---5 Wheaton, 326. 2 Condensed Rep. 533.

63. Where a check drawn by a person who is the cashier of an incorporated bank, and it appears doubtful on the face of the instrument whether it is an official or private act, may parol evidence be admitted to show that it was an official act?

It may.---5 Wheaton, 326. 2 Condensed Rep. 533.

I., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client (which he was authorized to do), and gave a receipt, signed "B. for Mr. I." I. was in bad circumstances when he left home, and he never returned, but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay the money over to the client, and on assumpsit brought against him for money had and received. Held that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it; the master, on the other hand, being answerable to the client, for the sum received by his clerk; and there was no privity of contract between the present plaintiff and the defendant.---*Stephens v. Badcock, B. & Adol.* 354.

OF THE RIGHTS AND LIABILITIES OF PRINCIPALS.

1. Whence do the rights to which principals are entitled, arise?

From obligations due to them by their agents, or by third persons
The rights against their agents are:

1st, to call them to an account at all times, in relation to the business of their agency.

2d, when the agent violates his obligations to his principal, either by exceeding his authority, or by positive misconduct, or by mere negligence, or omissions, in the discharge of the functions of his agency, or in any other manner, and any loss or damage falls on his principal, the latter will be entitled to full indemnity.---*Paley on Ag. by Lloyd*, 7, 71, 74, and note 2. 12 *Pick.* 328. 1 *B. & Adolph.* 415. 1 *Liverm. Ag.* 398.

3d, the principal has a right to supersede his agent, where each may maintain a suit against a third person, by suing in his own name, and he may, by his own intervention, intercept, suspend, or extinguish the right of the agent under the contract.---*Paley Ag. by Lloyd*, 362. 7 *Taunt.* 237, 243. 1 *M. & S.* 576. 1 *Liverm. Ag.* 226, 228. 3 *Chit. Com. Law*, 201, 203. 2dly, 2 *W. C. C. R.* 283.

The principal's rights against third persons arise---

1. When a contract is made by the agent with a third person, in the name of his principal, the latter may enforce it by action.

2. But contracts are not unfrequently made without mentioning the name of the principal; in such case he may avail himself of the agreement, for the contract will be treated as that of the principal as well as of the agent.---*Story Ag.* 109, 111, 403, 410, 417, 440. *Paley Ag. by Lloyd*, 21, 22. *Marsh. Ins. B.* 1, C. 8, § 3, p. 311. 2 *Kent's Com.* 3d edit. 630. 3 *Chit. Com. Law*, 201. *Vide* 1 *Pain's C. C. Rep.* 252, 3.

3. Third persons are also liable to the principal for any tort or injury done to his property or rights in the course of the agency.---*Pal. Ag. by Lloyd*, 363. *Story Ag.* 436. 3 *Chit. Com. Law*, 205, 206. 15 *East.* 38.

2d. The liabilities of the principal are either to his agent, or to third persons.

1. The liabilities of the principal to his agent are,

1st, to reimburse him all expenses he may have lawfully incurred about the agency.—*Story Ag.* 335. *Story, Bailm.* 196, 197. 2 *Liv. Ag.* 11 to 33.

2d, to pay him his commission, as agreed upon, or according to the usage of trade, except in cases of gratuitous agency.—*Story, Ag.* 323, *Story, Bailm.* 153, 154, 196 to 201.

3d, to indemnify the agent, when he has sustained damages in consequence of the principal's conduct. For example, when the agent has innocently sold the goods of a third person, under the direction or authority of his principal, and a third person recovers damages against the agent, the latter will be entitled to reimbursement from the principal.—*Pal. Ag. by Lloyd*, 152, 301. 2 *John. Cas.* 54. 17 *John.* 142. 14 *Pick.* 174.

2dly. The liabilities of the principal to third persons are,

1, to fulfill all the engagements made by the agent, for or in the name of the principal, and which come within the scope of his authority.—*Story, Ag.* 126.

2, when a man stands by, and permits another to do an act in his name, his authority will be presumed.—2 *Kent, Com.* 3d edit. 614. *Story, Ag.* 89, 90, 91; and articles Assent, Consent, 3.

2. What if the factor, in a case duly authorized, sells on credit, and takes a negotiable note payable to himself?

Then the note is taken in trust for his principal, and subject to his order; and if the purchaser should become insolvent before the day of payment, the circumstance of the factor having taken the note in his own name, would not render him personally responsible to his principal.—*Messier v. Amery*, 1 *Yeates' Rep.* 540. *Goodenow v. Tayler*, 7 *Mass. Rep.* 36. *Scott v. Surman*, *Willes' Rep.* 400.

3. If the factor should guarantee the sale, and undertake to pay if the purchaser failed, or should sell without disclosing his principal, would the note taken by him as factor still belong to the principal?

It would; and he might waive the guaranty, and claim possession of the note, or give notice to the purchaser not to pay it to the factor.—2 *Kent*, 623.

4. What if the factor fail?

The note would not pass to the assignees, to the prejudice of his principal; and if the assignees should receive payment from the vendee, they would be responsible to the principal, for the debt was not in law due to them, but to the principal, and did not pass under the assignment.—*Godfrey v. Furzo*, 3 *P. Wms. Rep.* 185. *Ex parte Dumas*, 1 *Atk. Rep.* 234. *Toeke v. Hollingsworth*, 5 *Term Rep.* 226. *Garrett v. Cullem*,

cited in *Scott v. Surman*, *Willis' Rep.* 405; and also by *Chambers, J.* in 3 *Bos. & Pull.* 490. *Kip v. Bank of New York*, 10 *Johns. Rep.* 63. *Thompson v. Perkins*, 3 *Mason's Rep.* 232.

5. What is the general doctrine on this subject?

It is this: that where the principal can trace his property into the hands of an agent or factor, he may follow either the identical article, or its proceeds into the possession of the factor, or of his legal representatives or assignees; unless they should have paid away the same in their representative character, before notice of the claim of the principal.—*Veil v. Mitchell*, 4 *Wash. Cir. Rep.* 105. *Taylor v. Plumer*, 3 *Maule & Selw.* 562.

6. Does the same rule apply to the case of a banker who fails, possessed of his customer's property?

It does. If it be distinguishable from his own, it does not pass to his creditors, but may be reclaimed by the true owner, subject to the liens of the banker upon it.—*Walker v. Burnell*, *Doug. Rep.* 303. *Bryson v. Wylie*, 1 *Bos. & Pull.* 83. *Bolton v. Puller*, *Ibid.* 539. In the case of *Sergeant*, 1 *Rose's Rep.* 153. *Parke v. Eliason*, 1 *East's Rep.* 544.

7. May the principal control the collection, and sue for the price in his own name?

He may; or for damages for non-performance of the contract; and it is immaterial whether the agent was an auctioneer, or a common factor. Though payment to a factor, for goods sold by him, would be valid.—*Girard v. Taggart*, 5 *Serg. & Rawle*, 19.

8. Upon what two facts does the liability of a principal depend?

1st. That the acts were done in the exercise of, and 2d, within the limits of the power delegated.—5 *Wheaton*, 326. 2 *Condens. Rep.* 533.

The acts of an agent without authority may be ratified by the principal so as to bind him in the same manner as if an original authority had existed.—9 *Cranch*, 153. 2 *Condensed Rep.* 533.

9. How must a contract be made by an agent, to be obligatory on the principal?

It must be made in the name of the principal. If the agent contract in his own name, describing himself as agent or attorney for his principal, the contract is that of the agent, and not that of the principal.—10 *Wen.* 87.

If made in the name of the principal, by an agent duly constituted, it is the contract of the principal, and he alone is responsible.—12 *Vesey*, 352.

10. If the agent buys in his own name, for the benefit of the principal, and without disclosing his name, is the principal also bound as well as the agent?

He is, provided the goods come to his use.—3 *Green*, 37.

11. If an agent exchanges without authority, the property of his principal, will the property given in exchange belong to the principal?

It will. It is a principle in law that a man shall never be a gainer by his own misconduct.—*M. & L.* 562.

12. If an agent or attorney is empowered by his principal to adopt such measures as may secure his claims against a debtor, and the measures adopted are unlawful, is the principal liable?

He is not; unless he was actually privy to them.—4 *East*, 1.

13. Is a principal liable for the acts of a general agent?

He is; although the agent disregards particular instructions relative to his agency; it is otherwise in the case of a special agent.—11 *Wen.* 87.

14. Does notice to an agent in the same transaction affect the principal?

It does.—3 *Mad.* 34. 2 *Eden.* 224.

15. When goods have been sold by a factor, is the owner entitled to call on the buyer for payment?

He is; and payment to the factor, after notice from the owner not to pay, would not prejudice the rights of the principal.—2 *Atk.* 394.

If, however, the factor have sold the goods as his own, and the purchaser have dealt with him as owner, although the principal is still entitled to his action against the buyer, yet to any such action the buyer may set off any claim or demand he may have against the factor.—2 *Kent*, 494.

16. Is every contract made with an agent, a contract with the principal?

If made in relation to the business of the agency, it is, provided the agent acts in the name of his principal.—2 *Kent*, 629.

17. If a coachman go in his master's livery stable, and hire horses, in his name, which his master uses, will the latter be bound to pay for the hire of the horses?

He will; although he has agreed with the coachman to pay him a large salary to provide horses; unless the owner of the horses had some notice that the coachman hired them on his own account, and not for his master.—*Rimell v. Sampayo*, 1 *C. & P.* 254.

18. If the owner of a horse send it to a common repository for the sale

of horses; or the proprietor of goods send them to an auction room, or to a broker whose ordinary business is to sell goods of that description, would the owner be bound by the sale?

He would, without his express consent, to a *bona fide* purchaser; because an authority to sell shall be presumed against him—See *Pickering v. Busk*, 15 East, 38, 43, per Lord Ellenborough, C. J. *Dyer v. Pearson*, 3 B. & C. 42, 4 D. & R. 652, S. C. per Abbott, C. J. *Boyson v. Coles*, 6 M. & Selw. 23, 24, per Bayley, J. *Williams v. Barton*, 3 Bing. 145, per Best, C. J.

19. When the party dealing with an agent, and with knowledge of the agency, elects to make the agent his debtor, can he afterwards have recourse against the principal?

He cannot.—*Patterson v. Gandasequi*, 15 East's Rep. 62. *Addison v. Gandasequi*, 4 Taunt. Rep. 574.

20. At what time must a warranty be made by an agent on a sale to affect an employer?

It must be made at the time of the sale, or must be connected by direct reference with the sale.

Thus an agent, employed to sell a horse, stated the age to the buyer at the time of showing the horse, but nothing was then said as to the price. It was held, in an action upon the warranty of age, that there being no complete contract of sale at the time of making the statement, for want of a price being fixed, it did not amount to a warranty by the agent at the time of the sale, so as to bind the master.—*Helger v. Hawke*, 5 Esp. 72. And see *Ld. Raym.* 1120. 1 Str. 414. *Dyer*, 76 A. Cro. Jac. 197, 630. 1 Roll. Abr. 96. 1 Salk. 211. 5 Dow, 164. 1 Camp. 361. 3 Camp. 523. 5 B. & A. 240. 1 Ry. & M. 136, 290.

The proposition is a general rule, applicable to all representations, whether made by the party himself, or by his agent, as connected with the contract.

But where a sale is made under written particulars, the verbal declarations of the agent or auctioneer at the time of sale are not admissible to contradict the particulars.—*Gunnis v. Erhart*, 1 H. Bl. 389. *Powell v. Edmunds*, 12 East, 6. *Howard v. Braithwaite*, 1 Ves. & Bea. 210. *Jones v. Edney*, 3 Camp. 285, S. P.

Although the verbal declarations of an auctioneer at the time of sale be not receivable in evidence to contradict the printed particulars, yet where personal information is given to the purchaser of a mistake in the particulars, there might in such a case be room for the admission of such evidence.—*Ogilvie v. Foliambe*, 3 Merivale, 53.

In what cases verbal statements, made before the completion of a contract, which is afterwards reduced into writing, can be received in evidence, see *Pickering v. Dawson*, 4 Taunt. 779, per Gibbs, C. J. *Kain v. Old*, 2 B. & C. 634, per Abbott, C. J.

21. Is it not a general rule, that the principal is bound by the acts of his general agent ?

It is; though the agent exceed his private instructions. But the rule does not apply to cases where the person dealing with the agent is apprised of the existence of the private instructions.—*Longworth v. Conwell*, 2 Blackf. 469.

22. Will a sale of land by an agent bind the principal, although no party to the contract ?

It will, if it shall appear that he afterwards acquiesced in the sale.—*Barbour v. Craig*, Litt. Sel. Ca. 213.

23. Is it not an invariable rule, both in law and equity, that the principal is civilly responsible for the acts of his agent ?

It is.—*Comm'rs. of Accounts v. Rose*, 1 Idem. 461, 470.

A. having appointed B. his general agent, and also given him a particular agency, to sell a tract of land, and receive payment of part of the purchase money, is bound to allow credits for any other payment made to him, before notice that his powers are revoked.—*Spencer v. Willson*, 4 Munf. 130.

24. Can one avail himself of a note and mortgage taken to him by another acting as his agent, and at the same time reject the terms and conditions on which they were executed ?

He cannot.—*Newell v. Hurlbut*, 2 Verm. 351.

25. What if a person receive negotiable paper, in the usual course of trade, for a valuable consideration, from an agent or factor having no authority to transfer ?

He would hold against the true owner, provided he was ignorant of that fact, and had no notice of the fraud.—*Oddington v. Bay*, 20 John. 637. S. C. 5 John. Ch. 54.

But where an agent or factor receives notes to be remitted to his principal, and passes them to the defendant as security against responsibilities assumed by him as endorser of the notes of such agent, and as the maker of notes previously lent to such agent for his accommodation, but not then payable, and the defendant had no notice that the notes so passed to him were the property of another person,—Held, that the notes not being received in the usual course of trade, nor for a present consideration, the defendant was not entitled to hold them against the true owner.—*Ibid.*

26. Does a covenant by the master of a ship with the owners, that he should be at the cost of the repairs, discharge them from their liability for repairs done by his orders ?

It does not.—*Rich v. Coe*, Cowp. 636.

27. Where an agent contracts under a commission *del credere*, what securities has the principal?

Two; first, the agent; second, the contracting party.—1 *Term Rep* 115.

28. Are joint factors each answerable for the other?

They are, when consignees.—3 *Wills*. 114.

PERSONAL LIABILITY OF AGENTS.

1. When does the agent become personally liable?

Only where the principal is not known; or where there is no responsible principal; or where the agent becomes liable by an undertaking in his own name; or when he exceeds his power.—2 *Kent*, 492.

2. To excuse himself from responsibility what must the agent show?

He must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf; so that the person with whom he deals may have recourse to the principal.—13 *John. Rep.* 58.

3. Are not agents responsible for those whom they themselves employ in the execution of the service they undertake?

They are.—*Lord North's case*, *Dy.* 161.

4. Is not the confidence induced by undertaking any service for another, a sufficient legal consideration to create a duty in the actual performance of it?

It is; therefore a gratuitous or voluntary agent, though the decree of his responsibility is greatly inferior to that of a hired agent, is yet bound to exert such a portion of activity and care, as may reasonably satisfy the trust reposed in him.—*Coggs v. Barnard*; 2 *Ld. Raym.* 909; and see *Sir Wm. Jones' Treatise on the Law of Bailment*, where this subject is fully and elaborately discussed.

5. Does a gratuitous promise render the person making it answerable as a hired agent?

It does not; nor is he bound to possess competent skill for the execution of the service.

If, however, he possess that skill, he is bound to exert it; and the possession of it will sometimes, from his situation or office, be presumed against him.—2 *Lord Raym.* 909.

6. Is it not established in equity, as a general principle (with few ex-

ceptions) that an agent can make himself an adverse party to his principal?

It is.—*Paley on Agency*, 11.

7. Is a factor liable in case of robbery, fire, or any other accidental damage, happening without his default?

He is not.—2 *Mod.* 100.

But though the immediate cause of the loss be one which no care could prevent, as lightning, or the like, yet if improper delay in the removal of the property had previously intervened, it is not excused by the nature of the accident.—*Caffrey v. Darby*, 6 *Ves.* 496.

8. Where the course of dealing between the principal and agent is such, that the latter has been used to effect insurances, by directions of the former, is he bound to comply with an order to insure?

He is, though he has no effects on hand at the time of receiving the order; unless notice has been previously given by him to discontinue that mode of dealing. But if he have effects in hand, he cannot in any case refuse to comply with the order.

Or, if the bills of lading, from which his authority is derived, contain an order to insure, this is an implied condition, which the agent must fulfill, if he accept the employment.—*Smith v. Lascelles*, 2 *T. R.* 189. *Beawes*, 43.

9. What if in any of these cases the agent neglect to make insurance?

Then he is himself, by the custom of merchants, to be considered as the insurer, and liable as such, in the event of loss; if no available insurance be effected, it is the same as if none at all were made.—*Wallace v. Telfair*, 2 *T. R.* 188. *Mal.* 86. *Beawes*, 43. 1 *T. R.* 24. *Delaney v. Stodard*, 2 *Ves.* 239.

10. If the agent do all that is usually done to get the insurance effected, is it sufficient?

It is; for he is no insurer, and not bound to procure insurance at all events.—*Smith v. Cadogan*, 2 *T. R.* 188.

11. Where duties are payable upon the importation or exportation of goods, is it the agent's business to take care that the proper entries are made, and the duties satisfied?

It is; for if by reason of a false or imperfect entry, or by being landed before the customs are paid or compounded, the goods be forfeited, the factor is liable to answer for the loss, unless indeed the entry be pursuant to the invoice or letters of advice, for then it is not his fault.

The extent of this liability is said by Malynes to be that of the cost price of merchandize to be exported, or the sale price of that which is to

be imported, with reference to the place where the seizure is made.—*Cro. Jac.* 263. 4 *Bac. Abr.* 599. *Cro. Jac.* 255. *Molloy*, 329. *Malynes*, 83. 13 *Vin. Ab.* 4. *Paley on Agency*, 24.

Where a man pays money by his agent, which ought not to have been paid, either the agent or the principal may bring an action to recover it back.—2 *Cowp. Rep.* 805.

12. If money is mispaid to a known agent, and an action brought against him for it, is it an answer to such action, that he has paid it over to his principal?

It is.—*Ibid.*

13. What if no price be limited by the instructions?

Then it should be the agent's endeavor to obtain the best which the thing sold is fairly worth; and to this end he is bound to exert that degree of vigilance and intelligence which might be expected from a prudent person in the management of his own business.

If, however, a price be fixed, from which he is not at liberty to depart, he will not be justified in selling for a less, unless, as in the case already mentioned, where the mode of sale directed to be used would make a secret limitation of the price, a fraud upon purchasers.—*Beawes*, 43. *Bexwell v. Christie*, *Cowp.* 395.

14. Is an agent liable for paying over money after notice?

He is.—*Cowper*, 566.

15. Is a payment by one party to the other's agent, before the time appointed, and without the other's consent at the risk of the payor?

It is.—13 *East*, 430.

The act of the consignee in respect to the cargo binds the consignor.—1 *Taunton*, 300.

16. Where an agent received the amount of a debt due on a judgment on which execution had issued, and immediately paid it over to his principal, although verbal notice was given to him by the defendant when the money was paid, that it was intended to sue out a writ of error to reverse the judgment which was afterwards done, and the judgment reversed, was the agent liable to repay the money?

He was not.—6 *Pet. Rep.* 8.

17. If a person who is under no legal obligation to execute an order undertake it and execute it unfaithfully, is he answerable for the consequences?

He is.—6 *Binn.* 308.

18. If money is mispaid to a known agent and an action brought against

him for it, is it an answer to such action, that he has paid it over to his principal?

It is.—*Ibid.*

19. In an action against an agent for failing to make insurance, to what defence is he entitled?

Any which an insurer could have made, for if nothing could have been recovered on the policy no real injury has been sustained by the default. The plaintiff therefore in such an action must recover according to his interest, which as well as the loss he must establish in proof, and the defendant may avail himself of a deviation in the voyage or the illegality of the intended insurance.—*Paley on Agency*, 20. *Park*, 4. *Hurdling v. Carton*, 1. *T. R.* 22. *Delany v. Stuart*, 7 *T. R.* 157. *Webster v. De Tasset*. In that case the great object of insurance was a bonus to be paid to a seaman at the end of the voyage.

Where an agent received the amount of a debt on a judgment upon which an execution had issued, and immediately paid it over to the principal, although a verbal notice was given to him by the defendants when the money was paid, that it was intended to sue out a writ of error, to reverse the judgment, which was afterwards done, and the judgment reversed, the agent was not held liable to repay the money.—*Bank of the United States v. The Bank of Washington*.

20. Are losses occasioned by the fraud or failure of third persons, to whom an agent has given credit pursuant to the regular and accustomed practice of trade chargeable upon him?

They are not, as the following instance will exemplify.

A banker who had received bills of exchange from his correspondent to procure payment, instead of receiving payment in money, took the acceptor's check, and delivered up the bills. The check was dishonored: but as it appeared that the banker had only pursued the usual course of business, Lord Kenyon declared himself clearly of opinion that he was not answerable for the event.—6 *T. R.* 12 *Russel v. Hankey*.

The receiver of Lord Plymouth's estate took bills in the country of persons who at the time were reputed to be of credit and substance in order to return the rents in London. The bills were dishonored, and the money lost; and yet the steward was held to be excused. 3 *Atk.* 480. *Knight v. Lord Plymouth*. This was mentioned by Lord Hardwicke, in support of his opinion, that if a trustee appoint rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable. And none of these cases his lordship observed are on account of necessity, but because the person acted in the usual method of business.—*Ex parte Parsons*, *Ambl.* 219, and see 1 *Br. Ch. R.* 452. 3 *Ves. Jun.* 566. 6 *Ves. Jun.* 226, 266. 5 *Ves. Jun.* 331, 839.

21. Is an agent liable for disobeying his instructions?

He is not, if obedience to them would not have secured the principal for the loss sustained.—*Term Rep.* 22.

22. Can an agent employed in the management of an illegal contract recover any compensation for his labor from the person at whose request it was performed, and who has had the benefit?

He cannot.—2 *Wills.* 133. *Stackpole v. Earl.*

23. Is a loss occasioned by any unauthorized disposal or adventure of the principal's money, and not prescribed by the usage of business, though intended for his benefit, chargeable to the agent?

It is.—*Ch. J. P.* 1 § 2.

24. If a person who is not acting strictly in the character of a factor, neglect to enforce the payment of rents from the tenants of property belonging to his principal, is he liable to his employer for the loss of the rents in the event of the insolvency of the tenants?

He is not, although he charge factor's fees.—*Mackdowal v. Buchan*, 5 *Dow's Rep.* 127.

25. Is a factor answerable against all events, for the safety of goods which he has in charge?

He is not; but it is sufficient if he do all that by his industry he may for their preservation.—*Vere v. Smith*, 1 *Vent.* 121. *Co. Lit.* 89.

26. What seems to be the criterion in relation to this matter?

That he keep them with the same care as he would his own.—2 *Lord Raymond*, 917. *Coggs v. Barnard*, *Holt* 131. *Moore*, 462. *Woodliff's case*, 7 *Vin. Abr.* 7. In this respect, factors differ from carriers and inn-keepers. But the liability of the latter is founded upon the nature of public trust and employment.—2 *Lord Raymond*, 917. It is said indeed, 4 *Co.* 84, *Southcote's case*, that hire is the foundation of the carrier's liability, which reason, if it were the true one, would equally affect factors; but see 2 *Lord Raymond*, 916. The same rule has been laid down with regard to auctioneers.—*Maltby v. Christie*, 1 *Esp. Cases*, 341.

26. Is the agent liable in cases of robbery, fire, or any other accidental damage happening without his default?

He is not.—*See note (l.) Co. Lit.* 88 b. *Anon.* 2 *Mod.* 100. It is a good discharge before auditors for a factor to say, that in a tempest because the ship was surcharged, the goods were cast overboard into the sea.—*Roll. Abr.* 124. *Bro. Tit. Account*, 10.

28. Is not an agent who deals as a merchant without the express consent of his principal, accountable to him for the profits made by his indirect dealing?

He is; that is, for the surplus charged by him above the prime cost of the article supplied, though not more than the principal must have paid to any other merchant.

"If, being a factor, he buy up goods which he ought to furnish as factor, and instead of charging factorage duty, or excepting a stipulated salary, he takes the profits, and deals with his constituent as a merchant, this is a fraud for which an account is due.—*East India Co. v. Henchman*, 1 *Ves. Jun.* 298.

29. Where the accounts are intricate and difficult, is not a bill in equity the more usual and suitable proceeding to compel an account?

It is, being best calculated to do justice between the parties, since the plaintiff can thereby obtain a discovery of books and papers, and have the benefit of the defendant's oath; who on the other hand, is entitled to all, both legal and equitable allowances; and if by his answer, he charge himself, the same is also a discharge, if there be no other evidence. And this is also the proper mode of compelling agents, to account for profits improperly or clandestinely made by breach of their trust.—*Mackenzie v. Johnston*, 4 *Mad.* 373. *Thompson v. Lambe*, 7 *Ves. Jun.* 588. 7 *Ves. Jun.* 411. 13 *Idem.* 47.

30. Is an agent justified in embarking the property of his principal in any manner not authorized by the terms of his employment?

He is not, however beneficial to his principal the prospect may be.—11 *Ves.* 550.

31. Is there not a distinction in the books, between public and private agents, on the point of personal liability?

There is. If an agent in behalf of government makes a contract, and describes himself as such, he is not personally bound, even though the term of the contract be such as might, in a case of a private nature, involve him in a personal liability.—*Macbeath v. Haldimand*, 1 *Term. Rep.* 172. *Davies v. Jackson*, 9 *Mass. Rep.* 490. *Hodgson v. Dexter*, 1 *Cranch, Rep.* 345. *Walker v. Swartout*, 12 *John's Rep.* 444.

It is not presumed that a public agent meant to bind himself personally for the government; and the party who deals with him in that character, is supposed to rely upon the good faith and undoubted ability of the government. An agent on behalf of the public may, however, bind himself by an express agreement.—2 *Kent*, 633.

32. If the agent bind himself personally, and engages expressly in his own name, will he be held responsible?

He will, though he should in the contract or covenant, give himself the description or character of agent.—*Appleton v. Binks*, 5 *East's Rep.* 148. *Foster v. Fuller*, 6 *Mass. Rep.* 58. *Duvall v. Craig*, 2 *Wheaton's Rep.* 56. *Tippets v. Walker*, 4 *Mass. Rep.* 595. *White v. Skinner*, 13 *John's Rep.* 307. *Stone v. Wood*, 7 *Cowen's Rep.*

33. What if the attorney acts without authority, but in the name of the principal?

Although he be not personally bound by the instrument he executes, if it contains no covenants or promise on his part, yet there is a remedy against him by a special action upon the case, for assuming to act when he had no power.—*Long v. Colburn*, 11 *Mass. Rep.* 98. *Harper v. Little*, 2 *Greenleaf's Rep.* 14.

34. If in any of these cases the agent neglect to make insurance is he liable?

He is; and according to the custom of merchants, he himself is to be considered as the insurer, and liable as such in the event of loss.—*Wallace v. Tilfair*. 2 *T. R.* 188, *in notes*. *Mal.* 86. *Beawes*, 43. 1 *T. R.* 24. *Delany v. Stodart*. 2 *Ves.* 239. If he limit the broker to too small a premium by which no insurance is effected he is liable.—2 *T. R.* 188. *Wallace v. Tilfair*.

And if no available insurance be effected, it is the same as if none at all were made.—*Id.*

It has been held, that, although no advantage can be taken of a gratuitous promise to procure insurance, in case of a total neglect to do so; yet, that if a voluntary agent actually proceeds to make insurance, but through his gross mismanagement the benefit of it is lost, he is answerable for the injury sustained.—*Wilkinson v. Coverdale*. 1 *Esp. Cas.* 74. *Seller v. Work, Marshall*, 208.

35. In action against an agent for a failure in making insurance, to what defence is he entitled?

As he stands in the place of an insurer, so he is entitled to any defence which an insurer could have made; for if nothing could have been recovered upon the policy, no actual damage has been sustained by default of it. The plaintiff, therefore, in such an action, must recover according to his interest, which, as well as the loss, he must establish in proof; and the defendant may avail himself of a deviation in the voyage, or the illegality of the intended insurance.—*Park* 4. *Harding v. Cartee*. *Delany v. Stodart*. 1 *T. R.* 24. 1 *T. R.* 22. *Delany v. Stodard*. 7 *T. R.* 157. *Webster v. De Tastet*. In that case, the object of the insurance was a bonus to be paid to a seaman at the end of a voyage, which is not an insurable benefit.

36. If the agent do all that is usually done to get this insurance effected is it sufficient?

It is; for he is no insurer; and not bound to procure insurance at all events —*Smith v. Cadogan*, 2 *T. R.* 188, *note*.

37. May the policy be effected by the agent in his own name?

It may; and it is not necessary that he should be described in it “as

agent."—1 *B. & P.* 346. *Note, Bell v. Gibson. Park 19. De Vigniese v. Samson. (Mellish v. Bell, 15 East 4.)* It is however, necessary, if the name of the agent only be inserted, that he should appear in evidence.

38. Does the policy when effected, become the property of the insured?

It does; and if wrongfully withheld by the agent, an action of trover lies for it. And although no policy had in reality been effected, yet the broker, having represented to his principal that it had, was not allowed in an action of trover for the policy, to contradict that representation, (although alleged to be made by mistake of his clerk,) in order to let in the objection that trover could not be maintained for that which had never existed.—*Harding v. Carter, Park. 4.*

39. Is the responsibility of an agent confined to the loss of his commission only?

No; but it extends to the amount of the damages which the principal suffers; either by direct injury occasioned to his own property, or by his being obliged to make reparation to others.—2 *Moll.* 327. *Roll. Abr.* 165. *Cro. Jac.* 265. *Lewson v. Kirk.* A verdict obtained against the principal for the act of his servant, is the measure of damages against the latter.—4 *T. R.* 490. *Green v. N. R. Company.*

40. When is an agent not chargeable for a breach of his instructions?

In cases where the compliance would have been a fraud upon others.—*Bexwell v. Christie, Cowp.* 395. Thus, an agent was employed to sell certain articles, and the condition of sale purported that the highest bidder should be the purchaser; but the agent had private instructions not to sell under a certain sum; notwithstanding which, he sold for the highest sum bid, though less than the sum prescribed; and upon an action brought against him by his employer, he had judgment in his favor, since he could not have obeyed his instructions, without practising a fraud upon the bidders.—*Cowp.* 395. But it would have been otherwise, if the direction had been to set the article up at the price mentioned, since no fraud would have ensued from the circumstance.—*Id. Ib.* 6 *T. R.* 642.

41. Does the law exonerate agents from the consequences arising from their having pursued the regular and accustomed modes of transacting business, although they might under particular circumstances, have acted to better advantage?

It does.—*Cowp.* 470. *Moore v. Morgue, 2 T. R.* 188. *Smith v. Cadogan, in notes.* 4 *Burr.* 2061. *Pitt v. Yaldon.*

This principle is exemplified in several instances, and is indeed a just consequence of that responsibility to which they are subjected, by neglecting the prescribed rules of their business. Thus, a banker who has received bills from his customer, to present for payment, and who takes in payment the acceptor's check, which is afterwards dishonored,

has been held to be discharged, because this is the usual course of trade.—6 T. R. 12. *Russel v. Hankey*, Amb. 219. *Warwick v. Noakes*. *Peake's Nisi Prius*, 68.

42. Is the mere absence of fraud or bad motive, sufficient to justify an act detrimental to the employer's interest?

It is not; unless it be sanctioned by the usual course of business. See this rule as applied to trustees, exemplified in the case of *Caffrey v. Darby*, 6 Ves. Jun. 496. Upon the authority of which the position in the text is conceived to be well founded, agents being regarded with less favor than trustees are.

43. If a person who is not acting strictly in the character of a factor, neglect to enforce the payment of rents from the tenants of property belonging to his principal, is he liable to his employer for the loss of the rents in the event of the insolvency of the tenants?

He is not, although he charge factor's fees.—*Macdoival v. Buchaw*, 5 Dow. Rep. 127.

44. Is a factor answerable against all events, for the safety of goods which he has in charge?

He is not; but it is sufficient if he do all that by his industry he may for their preservation.—*Vere v. Smith*, 1 Vent. 121. *Co. Lit.* 89.

AGENT'S RIGHT TO LIEN.

1. What is a general lien?

It is the right to retain the property of another, for a general balance of accounts; but a particular lien is a right to retain it only for a charge on account of labor employed, or expenses bestowed upon the identical property detained. The one is taken strictly, but the other is favored in law.—2 Kent, 634. *Heath, J.*, 3 Bos. & Pull. 494. *Tindall, Ch. J.* 4, *Carr. & Payne's Rep.* 152.

2. Where a person, from the nature of his occupation, is under obligation, according to his means, to receive, and be at trouble and expense about the personal property of another, has he a particular lien upon it?

He has; and the law has given this privilege to persons concerned in certain trades and occupations, which are necessary for the accommodation of the public.—2 Kent, 634.

3. May an agent have a lien upon the property of his employer intrusted to him in the course of trade?

He can, according to the custom of trade; not only in respect to the

management of that property, but for his general balance of accounts. To warrant that, however, the usage must have been so uniform and notorious to warrant the inference, that the party against whom the right is claimed had knowledge of it.—3 *Boss & Pull*.

4. May such general lien also be created by agreement ?

It may ; as where the agent gives notice that he will receive no property for the purpose of his trade or business except subject to his lien for a general balance.—6 *Wen. Rep.* 14.

5. How may the agent waive his right of lien ?

By a special agreement with his principal ; and also by express stipulation on receiving the goods to pay over the proceeds.—6 *Wen. Rep.* 258.

6. What is necessary for the creation and continuance of a lien ?

Possession ; but if the delivery to a third person be merely for the benefit of the factor, and with notice of the lien, it is in effect a continuance of the factor's possession, and the lien is retained.—7 *East*, 5. 4 *John. Rep.* 103.

7. Has the factor a lien upon the price of the goods he has sold ?

He has as factor, though he has parted with the possession of the goods ; and if he sell under a *del credere* commission or is in advance for the goods by actual payment, he may enforce payment from the buyer to himself in opposition to his principal.—2 *Kent*, 507.

8. Has not a person, as the law now is, in a variety of cases, a right to detain goods delivered to him to have labor bestowed on them, who would not be obliged to receive the goods in the first instance, contrary to his inclination ?

He has. A tailor or dyer is not bound to accept an employment from any one that offers it, and yet they have a particular lien by the common law upon the cloth placed in their hands to be dyed or worked up into a garment.—*Hob. Rep.* 42. *Yelv. Rep.* 67. *Green v. Farmer*, 4 *Burr. Rep.* 2214. *Close v. Waterhouse*, 6 *East's Rep.* 523, *in notis*.

9. Does the same right apply to a miller, printer, tailor, or wharfinger ?

Yes ; or whoever takes property in the way of his trade or occupation, to bestow labor or expense upon it ; and it extends to the whole of one entire work, upon one single subject, in like manner as a carrier has a lien on the entire cargo, for his whole freight.—2 *Kent*. 635.

10. Does this lien exist equally, whether there is an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price ?

It does. The old authorities, which went to establish the proposition that the lien did not exist in cases of a special agreement for the price, have been overruled, as contrary to reason and the principles of law; and it is now settled to exist equally, whether there be or be not an agreement for the price, unless there be a future time of payment fixed, and then the special agreement would be inconsistent with the right of lien, and would destroy it.—*Blake v. Nicholson*, 3 *Maule & Selw.* 168. *Chase v. Westmore*, 5 *Ibid.* 180. *Crawshay v. Hompay*, 4 *Barw. & Ald.* 50.

11. If goods come to the possession of a person by finding, and he has been at trouble and expense about them, has he a lien upon the goods for a compensation?

He has in one case only, and that is the case of goods lost at sea, and it is a lien for salvage.—*Hartford v. Jones*, 2 *Salk. Rep.* 654. 1 *Ld. Raym.* 393, *S. C.* *Hamilton v. Davis*, 5 *Burr. Rep.* 2732. *Baring v. Day*, 8 *East's Rep.* 57.

12. Does this rule apply to cases of finding upon land?

It does not; and though the taking care of property found, for the owner, be a meritorious act, and one which may entitle the party to a reasonable recompense, to be recovered in an action of assumpsit, it has been adjudged not to give a lien in favor of the finder; and he is bound to deliver up the chattel upon demand, and then recur to his action for a recompense.—2 *Kent*, 636.

13. What does the statute of New York give to the person who takes up strayed cattle?

The right to demand a reasonable charge for keeping them; and independent of that provision, there is no lien upon goods found.—2 *Kent*, 636.

14. On what is a general lien for a balance of accounts founded?

On custom, and it is not favored; it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties, to establish it.—2 *Kent*, 636.

15. Are not general liens looked at with jealousy?

They are; because they encroach upon the common law, and destroy the equal distribution of the debtor's estate among his creditors.—*Rushforth v. Hadfield*, 6 *East's Rep.* 519, *S. C.* 7 *East's Rep.* 224. *Bleaden v. Hancock*, 4 *Carr. Payne's Rep.* 152.

16. May not an agent, by the custom of the trade, have a lien upon the property of his employer intrusted to him in the course of that trade?

He may, not only in respect to the management of that property, but for his general balance of accounts.—2 *Kent*, 636, 637.

17. What must have been the usage of any trade, sufficient to establish a general lien ?

It must have been so uniform and notorious, as to warrant the inference that the party against whom the right is claimed had knowledge of it.—*Rooke, J. 3 Bos. & Pul. 50.*

18. May not this general lien be created by express agreement ?

It may ; as where one or more persons give notice that they will not receive any property for the purposes of their trade or business, except on condition that they shall have a lien upon it, not only in respect to the charges arising on the particular goods, but for the general balance of their accounts.

All persons who afterwards deal with them, with the knowledge of such notice, will be deemed to have acceded to that agreement.—2 *Kent*, 637.

19. Is not possession of the goods necessary to create the lien ?

It is ; and the right does not extend to debts which accrued before the character of the factor commenced ; nor where the goods of the principal do not, in fact, come to the factor's hands, even though he may have accepted bills upon the faith of the consignment, and paid part of the freight.—*Kinlock v. Craig*, 5 *Term Rep.* 119, 783.

20. Can the lien be acquired, where the party came to that possession wrongfully ?

It cannot. This would be as repugnant to justice and policy, as it would be to allow one tort to be set off against another.—2 *Kent*, 638.

21. Is the lien destroyed, when a factor makes an express stipulation, on receiving the goods to pay over the proceeds ?

It is. So if the party comes to the possession of goods, without due authority, he cannot set up a lien against the true owner ; as, if a servant delivers a chattel to a tradesman, without authority ; or a factor, having authority to sell, pledges the goods of his principal.—*Walker v. Birch*, 6 *Term Rep.* 258. *Daubigny v. Duvall*, 5 *Term Rep.* 604. *Hiscox v. Greenwood*, 4 *Esp. Rep.* 174. *M'Combie v. Davies*, 7 *East's Rep.* 5.

22. If the delivery to a third person be merely for the benefit of the factor, and as a servant to the factor, and with notice of the lien, is it in effect a continuance of the factor's possession ?

It is, and the lien is retained.—*M'Combie v. Davies*, 7 *East's Rep.* 5. *Urquhart v. M'Iver*, 4 *John's Rep.* 103. *Ganesford v. Dutillet*, 13 *Martin's Louis. Rep.* 284.

23. Is it universally true, that the actual delivery of part of the goods,

sold on an entire contract is equivalent, to an actual delivery of the whole ?

It is not ; it will depend upon the terms of the contract, and the intention of the parties ; and whenever the property in the part of the good not delivered does not pass to the vendee, the vendee's right of the lie for the price is of course preserved on the part retained.—*Blake v. Nicholson*, 3 *Macle & Selw.* *Wilde, J., in Parks v. Hall*, 2 *Pick. Rep.* 213.

24. Has a factor a general lien for the balance of his general account arising in the course of dealings between him and his principal ?

He has ; and this lien extends, to all the goods of the principal in his hands in the character of factor. A consignee or factor has a charge on the gross proceeds of the goods, not only for his commissions, but for all such expenses as a prudent man would have found necessary in such case, in the discreet management of his own affairs.—*Colley v. Merrill*, 6 *Greenleaf's Rep.* 50. *Kruger v. Wilcox*, *Ambl. Rep.* 252. 1 *Burr. Rep.* 494. *Lord Kenon*, in 6 *Term Rep.* 262. *Chambre, J.*, 3 *Bos. & Pull* 489.

25. Has the factor a lien, also, on the price of goods which he has sold as factor ?

He has, though he has parted with the possession of the goods ; and he may enforce payment from the buyer to himself, in opposition to his principal.—2 *Kent*, 640. This rule applies when he becomes surety for his principal, or when he sells under a *del credere* commission, or is in advance for the goods by actual payment.—*Drinkwater v. Goodwin*, *Cooper's Rep.* 251. *Chambre, J.*, 3 *Bos. & Pull.* 489. *Hudson v. Granger*, 5 *Barnes & Ald.* 27.

Where a factor endorsed bills for his principal, his liability, with a reasonable apprehension of danger, gives him a lien on other bills in his hands belonging to his principal, to meet the event of his endorsement.—*Hodgson v. Payson*, 3 *Harr. & John's Rep.* 339.

26. Have attorneys and solicitors, as well as factors, a general lien upon the papers of their clients, for the balance of their professional accounts ?

They have, but the lien is liable to be waived, or divested, as to papers received under a special agreement or trust, or where they take security from their clients.—*Lord Mansfield Doug.* 104. *Ex parte Sterling*, 16 *Ves.* 258. *Cowell v. Simpson*, *Ibid.* 275. *Ex parte Nesbitt*, 2 *Sch. & Lef.* 279.

27. How far does the attorney's lien, for costs extend ?

It extends to judgments recovered by him ; and yet a *bona fide* settlement or payment by the debtor, before notice of the lien, will prevail against it ; and the attorneys upon a judgment yield to the debtors, equi-

table right of set-off. "We follow," says Chancellor Kent, "in New York, the rule of the English Court of Chancery, and of the court of K. B., and consider the lien subject to all the equities that may attach on the fund, and as extending only to the clear balance resulting from the equity between the parties."—*Vaughan v. Davies*, 2 H. Blacks. Rep. 440. *Porter v. Lans*, 8 John's Rep. 357. *Mohawk Bank v. Burrows*, 6 John's Ch. Rep. 317.

28. Have dyers a lien on the goods sent to them to dye?

They have for the balance of a general account.—*Savill v. Barchard*, 4 Esp. Rep. 53.

29. Has a banker, like an attorney, also a lien on all the paper securities which come to his hands for the general balance of his accounts?

He has; subject to be controlled by special circumstances.—*Davis v. Bowsher*, 5 Term Rep. 488. *Jourdain v. Lefever*, 1 Esp. Rep. 66.

30. May the same thing be said of an insurance broker?

It may, and his lien exists even though the consignor should assign the interest covered by the policy, for the assignee would take subject to the lien. If, however, the insurance broker be employed by an agent of the principal, and with knowledge that he acted as agent, the broker has no lien upon the policy for any general balance that may be due to him from the agent.

It was also decided by Lord Kenyon, in *Naylor v. Mangles*, and afterwards recognized as settled law, that a wharfinger had not only a lien on goods deposited at his wharf, for the money due for the wharfage of those particular goods, but that he was also entitled by the general usage of his trade, to retain them for the general balance of his accounts, due from the owner.—*Gordin v. London Assurance Company*, 1 Burr. Rep. 189. *Whitehead v. Vaughan*, Cooke's B. L. 316. *Maanss v. Henderson*, 1 East. Rep. 335. 1 Esp. N. P. Rep. 109. *Spears v. Hartley*, 3 Esp. N. P. Rep. 81. *Heath and Chambre, J., in Richardson v. Goss*, 3 Bos. & Pull. 119.

31. What if a factor having goods consigned to him for sale, should put them into the hands of an auctioneer, or commission merchant connected with the auctioneer in business, to be sold?

In such case the auctioneer may safely make an advance on the goods, for purposes connected with the sale, and as payment in advance, or in anticipation of the sale, according to the usage in such cases.—*Lausatt v. Lippincott*, 6 Serg. & Rawle, 386.

If the goods be put into the hands of an auctioneer, or seller, and instead of advancing in reference to the sale, according to usage, the auctioneer should become a pawnbroker, and advance money on the goods by way of loan, and in the character of a pawnor, instead of seller, he would have no lien on the goods.—2 Kent.

HOW TERMINATED.

1. How may the authority of an agent terminate ?

It may terminate in various ways ; it may terminate by the death of the agent, by the limitation of the power to a particular period of time, by the execution of the business which the agent was constituted to perform, by a change in the state or condition of the principal, by his express revocation of the power and by his death.—2 *Kent*, 643.

2. Is the agent's trust transferable, either by the act of the party, or by operation of law ?

It is not, it terminates by his death ; and this results, of course, from the personal nature of the trust.—*Dig.* 17. 1. 27. 3. *Pothier, Traite du contrat de Mandat*, No. 101.

3. How was it according to the civil law, if the agent had entered upon the execution of the trust in his life time, and left it partially executed but incomplete, at his death ?

His legal representatives would be bound to go on and complete it. *Pothier* adopted this principle as just and reasonable ; and there can be no doubt that the principal will be bound to complete a contract partly performed by him by the act of his agent, by a suit at law, or in equity, according to the nature of the case. But the representatives of the agent will have nothing to do with it, unless the business be in such a situation, that it cannot be performed without their intervention.

The cases stated in the civil law, and by *Pothier*, were between the principal and the agent, and not between a third person and the representatives of the agent dealing in the character of agent.

Nor can an authority, given for private purposes to two persons, be executed, by the survivor, unless it be so expressly provided, or it be an authority coupled with an interest.—*Dig.* 17. 1. 14. and 17. 2. 40. *Pothier, traite du de contrat Mandat*, No. 102. *Co. Lit.* 132. B. 181. B.

4. Has a *bona fide* holder of a promissory note, in which a bank is the nominal payee, a right to sue in the name of the bank ?

He has.—*Thus in the case of the President, Directors, and Company of the Bank of Chenango v. Hyde, et al.* 4 *Cowen*, 567.

Where the defendants made their note payable to the plaintiffs ; and with a view to procure a discount at their bank ; but the bank refusing, B. an attorney at law himself discounted the note at the request of Hyde, one of the makers of the note ; and who had been entrusted with the note to get it discounted. The understanding at the time that the note should be deposited in the bank, who were to receive the money for B. The note not being paid, B. sued in an action for money lent, and obtained judgment ; but the judgment not resulting in satisfaction, he then sued an action in the name of the bank, against all the makers of the note and re-

covered. It was urged that the bank could not be trustees for B., this not being within the scope of the powers conferred by their act of incorporation. But the court considered the objection as unsound: and observed that "if the bank had refused the use of its name, a court of equity would have compelled it to allow such use on proper terms."

If the suit against H. had been upon the note, the case of *Robertson v. Smith*, 18 *John's*, 459, would then have applied with force as to the point of an extinguishment of H's. liability on the note.—*Judgment for the plaintiffs.*

5. Is not a power of attorney, in general, from the nature of it, revocable at the pleasure of the party who gave it?

It is; but where it constitutes part of a security for money, or is necessary to give effect to such security, or where it is given for a valuable consideration, it is not revocable.—*Walsh v. Whitcomb*, 2 *Esp. Rep.* 565. *Lord Eldon in Broomley v. Holland*, 7 *Ves.* 28. *Hunt v. Rousmanier*, 8 *Wheaton's Rep.* 174. *Gausson v. Morton*, 10 *Barnwell & Cressler* 731. *Vingor's Case*, 8 *Co.* 81 B.

6. In the case of a law revocation of the power, by the act of the principal, is it not requisite that notice be given to the attorney?

It is. And all acts *bona fide* done by him under the power, prior to the notice of the revocation, are binding upon the principal. This rule is necessary to prevent imposition, and for the safety of the party dealing with the agent; and it was equally a rule in the civil law.—*Pothier, Traite des Oblig.* No. 80. *Buller, J. in Salter v. Field*, 5 *Term Rep.* 211. *Bowerbank v. Morris*, *Wallace's Rep.* 126. *Spencer & White v. Wilson*, 4 *Munford's Rep.* 130. *Mellen, Ch. J. in Harper v. Little*, 2 *Greenleaf's Rep.* 14. *Dig.* 17. 1. 15.

7. Is not the agent's power determined, by the bankruptcy of his principal?

It is; but this does not extend to an authority to do a mere formal act, which passes no interest, and which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy.—*Dixon v. Ewart*, 3 *Merivale's Rep.* 322.

8. Will the bankruptcy of the principal effect the personal rights of the agent, or his lien upon the proceeds of a remittance made to him under the orders of his principal, before his bankruptcy, but received afterwards?

It will not.—*Alley v. Hotson*, 4 *Campl. N. P. Rep.* 525.

DECISIONS IN THE U. S. SUPREME COURT.

1. Are the United States bound by the declarations of their agents, founded upon a mistake of fact?

They are not; unless it clearly appear that the agent was acting within the scope of his authority, and was empowered in his capacity of agent to make such declaration.—*Lee v. Munro and Thornton*, 2 U. S. Condensed Rep. 531.

2. Do the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency?

They do not.—*Mechanics' Bank v. Bank of Columbia*, 5 Wheaton, 326. 4 U. S. Condensed Rep. 666.

The liability of the principal for the acts of his agent depends upon the facts—

1st, that the act was done in the exercise, and

2d, within the limits of the power delegated.—*Ibid.*

3d, in ascertaining these facts, as connected with the exercise of any written instrument, not under seal, parol testimony is admissible.—*Ibid.*

H. and others, merchants in Baltimore, consigned a vessel and cargo to W. and others, merchants in Amsterdam, with instructions to them respecting her ulterior destination, which showed that on the failure of getting a freight to Batavia, or of selling the vessel at a price limited, she was to proceed to St. Petersburg, and there take in a return cargo of Russian goods, for the United States; but with instructions to the master committing to him the management of the ulterior voyage.

No freight to Batavia could be obtained, and the vessel could not be sold for the price limited at Amsterdam; and W. and others purchased in Amsterdam, with the concurrence of the master, a return cargo of Russian goods, partly with the money of H. and others, and partly with money advanced by themselves.

On the return of the vessel to Baltimore, H. and others objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and gave notice to W. and others of their determination to hold them responsible for all losses sustained in consequence of this breach of instructions; but received the goods and sold them.

W. and others brought an assumpsit against H. and others to recover from them the money advanced. The declaration contained the three usual money counts.

Held, 1st, that the plaintiffs had a demand in law against the defendants, which could be maintained in this form of action.

Secondly, that whether the plaintiffs could or could not be made responsible in any form of action which might be devised for the possible loss resulting from the breaking up of the intended voyage to St. Petersburg, the defendants were not entitled to a deduction from the plaintiffs' demand, for the amount of such loss.—*Wilkins v. Hollingsworth*, 6 Wheaton, 240. 5 U. S. Condensed Rep. 79.

It is believed to be a general rule, that an agent with limited powers cannot bind his principal when he transcends his power.

It would seem to follow, that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority; yet if his principal has, by his declarations or conduct, authorized the opinion, that he had given more extensive powers to his agent, than were in fact given, he would not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct has sanctioned.—*Schimmelpennich et al. v. Bayard et al.*, 1 *Peter's Rep.* 290.

3. If the principal, after a knowledge that his order has been violated by his agent, receives merchandize purchased for him contrary to orders, and sells the same, without signifying any intention of disavowing the acts of the agent, may not an inference in favor of a ratification of the acts of the agent, be fairly drawn by the jury?

It may; but if the merchandize was received by the principal, under a just confidence that his orders to his agent had been faithfully executed, such an inference would be in a high degree unreasonable.—*Bell et al. v. Cunningham*, 3 *Peter's Rep.* 81.

The faithful execution of orders which an agent or correspondent has contracted to execute, is of vital importance in commercial transactions, and may often affect the injured party far beyond the actual sum misapplied.

A failure in this respect may entirely break up a voyage, and defeat the whole enterprize.

Speculative damages, dependent on possible successive schemes, ought not to be given in such cases; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate.—*Ibid.* 85.

The jury in an action for damages for breach of orders, may compensate the plaintiff for actual loss, but not give vindictive damages.

The profits which would have been obtained on the sale of the article directed to be purchased, may be properly allowed as damages.—*Ibid.* 86.

No principle is better settled, than that the power of an agent ceases on the death of his principal.—*Galt et al. v. Galloway et al.* 4, 34, 4.

When an agent received the amount of a debt due on a judgment on which an execution had issued, and immediately paid it over to the principal, although a verbal notice was given to him by the defendants when the money was paid, that it was intended to sue out a writ of error, to reverse the judgment, which was afterwards done, and the judgment reversed, the agent was not held to repay the money.—*Bank of the United States v. The Bank of Washington*, 6 *Peters' Rep.* 8.

4. Must not every authority given to an agent or attorney to transact business for his principal in the absence of any counterproof, be construed to be to transact it according to the laws of the place where it is to be done?

It must; and a sale of slaves authorized to be made in Louisiana by an executrix, must be presumed to be intended to be done in the manner required by the laws of that State to give it validity; and the purchaser, equally with the seller, is bound under these circumstances to know what the laws are, and to be governed thereby.

The law will never presume that parties intend to violate its precepts.—*Owings v. Hull*, 9 *Peters' Rep.* 607.

A ratification of the unauthorized acts of an attorney in fact, without a full knowledge of all the facts connected with those acts, is not binding on the principal.

No doctrine is better settled on principle and authority than this, that the act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts.

If the material facts be either suppressed or unknown, the ratification is not valid, because founded on mistake or fraud.—*Owings v. Hull*, *Ibid.* 608.

LOUISIANA DECISIONS.

1. If A. buys goods for B., giving his own note, and draws on B., who pays the draft, can the goods, on the failure of A. be arrested in the hands of another agent of B. for the debt of A.?

They cannot.—*Emerson v. Gray & Taylor*, 3 *Lou. Rep.* 697.

2. Cannot an agent who stipulated in his own name, and comes and sues for the use of his principal, transfer his right of action to his principal?

He can; and this enables the principal to appear in the case as the real plaintiff.

The whole penalty only recoverable on showing the absolute failure to perform the contract.—*M'Nair v. Thompson et al.*, 5 *Lou. Rep.* 525.

3. Is not an agent who receives a bill to present for acceptance or payment, bound to use the same diligence in giving notice as the holder?

He is, and if he neglects to give notice the *onus* of showing that there was no danger is thrown on the agent.

But the agent may show want of funds in the drawee's hands, to excuse his neglect in giving notice.—*Crawford v. Louisiana State Bank*, 1 *N. S.* 214.

4. Is not an agent a competent witness?

He is.—*Robertson v. Nott*, 2 *N. S.* 122.

5. Does an authority to an agent to bring suit and carry it on to a final judgment, authorise him to enter into a compromise?

It does not.—*Civil Code*, 422, art. 10.

Nor does the agent's receiving of the part of the property confirmed in the judgment under the compromise, affect his constituent, whether in the said agent's character of co-plaintiff (which he was) and as such, was the creditor only for the portion due to himself, or of madatory, (which he also was,) for with regard to the power to sue, the 7th law of the 14th title of the 5th *partida* expressly declares, that an agent with this simple power cannot legally receive the amount recovered by the judgment.—*Kilgour v. Radcliffe's Heirs*, 2 N. S. 392.

The law in this case, more attentive to the heir who is absent, than to him who is present, forbids the debtor to pay or deliver, unless all having an interest in the thing are prepared to receive it.—*Civil Code*, 282, art. 120. *Ibid.* 288, art. 139. *Toullier, Droit. Civil* L. 3. T. 3, C. 4, N. 775.

6. Can any one who may directly be a winner or loser, testify ?

He cannot. On a bill of exceptions, the court *ad quam* will weigh objections made before the judge *a quo*.

Although the rejected evidence comes up, the case will be sent back, if a jury were prayed, and there be contradictory evidence.—*Pratt v. Flowers*, 2 N. S. 333.

7. Can interrogatories propounded to a party in a suit be answered by his agent ?

They cannot.—*Buford v. Valentine*, 3 N. S. 57.

8. If a commission merchant send an account current, in which a balance appears due from him, which he afterwards pays, will he be allowed to recover it back on the ground that he sold his correspondent's cotton for a bill of exchange on New York, which has since been returned protested ?

He will not, if he did not before disclose this circumstance ; especially if the correspondent consigned the cotton for a third party, to whom he has paid the proceeds.

The right of factors to sell on credit, and in what manner principals ought to receive due information of the manner of sale, etc.—*Fisk et al. v. Offit et al.*, 3 N. S. 553.

9. If an agent, who is to be paid on condition that he succeeds in the business entrusted to him, be dismissed without cause, cannot he claim a sum equal to the trouble he has been put to ?

He can.—*Lanusses's Syndics v. Pimpicarella*, 4 N. S. 439.

10. Is not an agent, who surrenders a note belonging to his principal, and takes one payable at a distant day to himself, and delays bringing suit at maturity, chargeable with its amount ?

He is.—*Littlejohn v. Ramsay*, 4 N. S. 955.

11. In an action against an agent for endorsing a note without authority, must not proof be given of notice of protest to him, or to the principal?

It must. Depositing the notice in a post-office is not sufficient, if the endorser lives in the place where the post-office is situate. And if he lives out of the place, the notice is bad, if directed to him as living in it.—*Clay v. Oakley*, 5 N. S. 137.

12. May not an attorney be called on by his client's adversary, to testify in the cause in which he is employed?

He may. A payee, and endorser of a note is a good witness to prove that he acted as agent for another in taking the note payable to himself.—*Cox v. Williams*, 4 N. S. 139.

13. Is not an agent a competent witness in all matters connected with his agency, without a release?

He is. A witness whose interest is equal is competent; and his being liable for costs, will not render him incompetent, if he is at the same time agent.—*Martial v. Cotterel*, 5 N. S. 274.

14. Can an agent sell a slave under a general power?

He cannot; the sale is void until ratified by the owner. The receipt of the price by him would be a ratification.—*Adams v. Gainard*, 7 N. S. 244.

15. When a debt is assigned as collateral security, does not the holder become agent for the collection?

He does; and the net amount, after deducting costs and other charges, should be credited.—*Chew v. Chinn*, 7 N. S. 532.

M. authorized B. B., who were partners in the practice of law, as his agents, to sell a tract of land for 4000 dollars; but writes to C. on the subject of the land, and says "he has a thought of asking 6000 dollars;" but does not name any price; and in the meanwhile B. B. sells it for 4000 dollars. The agency of B. B. is not revoked by the letter from M. the principal, to C.—*Jackson et al. v. Porter*, 8 N. S. 200.

16. Are agents with general power bound to exercise more than ordinary diligence, and such as is customary in similar undertakings?

They are not.—*Millaudon v. M Micken*, 7 N. S. 34.

17. Must not the principal relieve the agent from any responsibility properly incurred?

He must.—*Flower et al. v. Jones & Gilmore*, 7 N. S. 140.

18. Cannot the agent maintain a suit against the principal not merely for repayment but for indemnity?

He can ; and the latter can only be released by producing an act by which the creditor accepts him in the place of the agent, or by paying the debt.—*Flower et al. v. Jones & Gilmore*, 7 N. S. 140.

19. Is not a merchant who has funds of another in his hands, and is compelled by political events to send them away, as much as possible to retain a control over them ?

He is ; and as soon as the cause which induced him to part with them ceases, must dispose of them according to orders.—*Perez et al. v. Miranda*, 7 N. S. 493.

20 If the party trusted be solvent at the time, would his ceasing to be so render the party who trusted him liable ?

It would not.—*Bailey et al. v. Baldwin*, 8 N. S. 114.

21. Is not a factor who employs an agent to sell goods without the authority of his principal, responsible for the agent ?

He is.—*Reynolds et al. v. Kirkman et al.*, 8 N. S. 464.

When goods are sold to an agent for an unknown principal, the latter is sueable, when discovered, although no inquiry was made by the vendor ; unless the latter let the day of payment go by without demand on the principal, who afterwards pays the agent.—*Williams et al. v. Winchester*, 7 N. S. 22.

22. What must the party show who claims from the owners of a steamboat for a slave carried away in her ?

That they could have prevented it.—*Palfrey v. Kerr et al.* 8 N. S. 503.

23. Where the mandate gives the power to sell, would the opinion expressed by the principal that the property should bring a certain sum, invalidate a sale by the agent for less ?

It would not.—*Executors of Sprigg v. Herman*, 6 N. S. 510.

24. If A. purchases slaves for B., who refuses to recognize A.'s agency, will any title pass to B. ?

They will not.—*Michoud, Syndic of the Creditors of Dalon v. Lacroix*, 8 N. S. 445.

ARBITRATION AND AWARD.

1. What is arbitration and award ?

Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels, or personal wrong, to the judgment of two or more arbitrators ; who are to decide the controversy : and if they do not agree, it is usual to add, that another person be called in as umpire (*imperator* or *impar*) to whose sole judgment it is then referred, or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an award. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court of justice. But the right of real property cannot thus pass by a mere award : which subtilty in point of form (for it is now reduced to nothing else) had its rise from *feodal* principles ; for if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of land ; and it will be a breach of the arbitration bond to refuse compliance.—3 *Black. Com.* 16.

2. How must an award be made, and upon what grounds may it be vacated ?

It must be made in writing, and may be vacated upon the grounds ;

1st. That it was procured by corruption, fraud, or undue means.

2d. That there was partiality or corruption in the arbitrators, or either of them.

3d. That they were guilty of misconduct in refusing to postpone the hearing, or to hear evidence, or for other misbehaviour by which rights may be prejudiced.

4th. That they exceeded their powers or so imperfectly executed them, that a mutual, final and definite award was not made.—2 *R. S.* 542. 10 *Wend.* 589.

3. How may the court at the next term after the publication of an award, modify or correct such award ?

The court may correct such award ;

1st. Where there is a miscalculation of figures, or mistake in any person, thing or property referred to in the award.

2d. Where an arbitration is made upon matters not submitted.

3d. Where an award is imperfect in some matter of form. 2 *R. S.* 542. 10 *Wend.* 589.

The satisfaction must be a reasonable one. Generally speaking, the mere acceptance of a less sum is not in law a satisfaction of a greater sum.—5 *East*, 230, and this though an additional security be given.—1 *Stra.* 426.

4. What if a *feme sole* submit to arbitration and marry before the award is delivered?

Such a marriage is in effect a revocation unless notice be given to the arbitrators.—2 *Keb.* 865. *Jones*, 388. *Roll. Arb.* 331; but the husband and the wife may be sued on their bond for such revoking.—5 *East*, 266.

5. Will the death of the arbitrators, or one of them defeat the reference?

It will; unless there be a clause in the submission to the contrary, see 4 *Monroe*, 3; so if the arbitrators do not make the award within the limited time, or they disagree or refuse to act or intermeddle any further.—1 *Roll. Ab.* 261. 2 *Saund.* 129. *Tidd. 8ed.* 877.

6. Can submission or award be made in relation to title to real estate?

No it cannot; neither to an annuity, or to criminal causes.—1 *Bac. Abridg.* 132.

7. Where there are on one side two or more parties to a submission, must they all unite in the revocation?

They must, or it cannot be revoked.—12 *Wend.* 578.

8. Can the powers of the arbitrators be revoked after the matters in difference have been once submitted to them?

They cannot.—2 *R. S.* 449, § 23.

9. Until what time may either party revoke the submission?

At any time previous to the matters in difference having been submitted to the arbitrators; subject however, to the right of the other party to recover of him the damages sustained by such revocation.—15 *John*, 205. 2 *R. S.* 440, § 23.

10. What if arbitrators go beyond their authority?

In such case their award to that extent is void. But if the merits of the submission are not affected the residue may be valid.—1 *Wend.* 326.

11. How is it where a party's title to land is referred with his consent?

The award is conclusive evidence, and binding on him and his heirs and assigns, as to such title.—3 *East*, 15. See however, 2 *R. S.* 541, § 2.

12. Are debts due under seal discharged by naked award?

They are not, but if the submission be by bond, or under seal, the award discharges; for one specialty or sealed instrument may be dissolved by another.—1 *Bac. Abridg.* 133.

13. What is necessary to make an award sustainable?

1st. Pursue the submission. It cannot award an act to be done by one not a party to the submission. The submission must provide that a number less than the whole may make the award, otherwise an award made by a less number will be void.---6 *J. R.* 39.

The authority given in the submission must be strictly pursued.---6 *J. R.* 14.

2d. It must be mutual. If it give a benefit to one party without any co-relative advantage to the other, it is void.---1 *Saund.* 326-7. 1 *Salk.* 70. a.

3d. It must be both possible and reasonable.

4th. It must be certain.---14 *J. R.* 96.

5th. It must be final on all the matters submitted.---1 *Cain's R.* 304. Hence an award to stand to arbitrament or award of another is bad. It determines nothing finally.

14. Can any matter submitted be afterwards litigated?

No, unless the submission be revoked in time, and except there has been corrupt or improper conduct in the arbitrators.---3 *J. R.* 367.

15. Can an award be impeached on the ground that it is against law?

It cannot.---14 *J. R.* 96.

As an arbitration is a domestic tribunal, created by the parties, if they suffer their matters in difference to be finally submitted.

16. What will be the results?

They must perform the award in all cases, except where there is fraud, corruption or misbehaviour in the arbitration.---1 *Str.* 30.

The law relating to the proceeding during the conduct of the arbitration, and the duties of arbitrators and umpires, will be found in 3 *Chitty Com. Law*, 650, 656. and *Caldw. Arb.* 42, 45, as to the power, &c. of awarding costs, see *Tidd. 8ed.* 833 to 887; as to when a court of equity will compel an arbitrator to proceed, see *Swants.* 40. As to the general requisites to an award, and how it will be construed, see *Chitty Com. Law*, 656. 66 *Tidd. 8ed.* 882. For the remedy to compel the performance of an award, see *Tidd. Prac. 8ed.* 887, 894. 3 *Chitty Com. Law*, 660, 665, and for relief against an award, see 3 *Chitty Com. Law*, 665, 668. *Tidd. Prac. 8ed.* 894, 898.

ASSIGNMENT

1. What is assignment?

An assignment is properly, a transfer, or making over to another, the right one has in any estate.---2 *Com.* 326.

Choses in action are not assignable at law. So bare rights and possibilities are not assignable.

Interest in contingencies respecting personal estates are assignable in equity, but the assignee is there required to show that he gave a valuable consideration for the thing assigned.

Although choses in action are not assignable at common law, yet courts of law will protect the assignee against the acts of the assignor, in a suit brought in the name of the latter for the benefit of the former.

A judgment and obligation under seal may be assigned in equity, by a writing not under seal. A mere delivery of a chose in action for a valuable consideration is sufficient.—19 *J. R.* 95.

The assignment of a judgment for debt, carries the debt; and if the debt be secured by a mortgage, carries the mortgage interest.—9 *Cowper*, 747. 5 *Cow.* 220.

2. Suppose a lease be made for years, of lands, excepting the woods, and the lessor grants the trees to the lessee, and he assigns the lands over to another; do the trees pass by this assignment to the assignee, or, do they not?

They do not.—*Goldsb.* 188.

3. Is an office of trust grantable, or assignable to another?

It is not; and therefore it was adjudged that the office of a *filazer*, which was an office of trust, could not be assigned; nor could it be extended upon statute.—*Dyer*, 7. See *tit. Office, Bac. Abr.* (7th ed.)

4. Is a bare power assignable?

It is not; but where it is coupled with an interest it may be assigned.—2 *Jon.* 206. 2 *Mod.* 317.

5. To what does the assignee of a mortgage take it subject?

He takes it subject to all the equities existing in the hands of the mortgagor.—9 *Cow.* 409.

6. When is an assignee liable for covenants broken?

He is liable only while he continues assignee, and he may discharge himself of liabilities for any subsequent breaches, by assigning to another.—9 *Cow.* 88.

7. To what does an assignee of a chose in action take it subject?

He takes it subject to all liens against the assignor.—5 *Cow.* 576.

An assignee of a chose in action takes it subject to all equities existing against it at the time of the assignment, though he have no notice of such equity.—3 *Cow.* 353.

8. To whom must assignees give notice, to ensure protection?

They must give notice to the debtor of the assignment.—19 *J. R.* 95.

9. What words are required in an assignment ?

Grant, assign, and set over ; which may amount to a grant, feoffment, lease, release, confirmation, &c.—1 *Inst.* 301.

10. How may an insolvent debtor be discharged from his debts ?

There are various ways ; one of which is by procuring a petition to be signed by his creditors in the United States, having against him two-thirds in amount of all debts owing by him to creditors in the United States, and on his making an assignment of all his property.—2 *R. S.* 16, &c.

An insolvent may also, without procuring any such petition, obtain exemption of his person from imprisonment.—2 *R. S.* 28, &c.

11. Where the debtor is prosecuting a manufacturing or mercantile business, may the assignee be authorized under the assignment to carry on the business ?

He may ; and sell the manufactured articles, work up and sell the unmanufactured articles, and dispose of the assigned property, in fulfilment of the trusts created in the assignment.—11 *Wen.* 240.

The principle is, that whatever is obviously for the benefit of the creditors will be sustained.

12. May a debtor prefer one creditor or set of creditors, to another, or others, in his assignment ?

He may, provided he devote the whole of the property assigned, to the payment of his just debts, and that the assignment be absolute and entirely unconditional.—11 *Wen.* 189.

13. Are sureties on existing or future responsibilities for an assignor, entitled to an indemnity and preference by an assignment ?

They are as much so as creditors.—11 *Wen.* 240.

An assignment containing a provision making a preference to certain creditors in the distribution of the assigned property, to depend upon the execution by them of a release to the debtor of all claims against him is void.—11 *Wen.* 187.

Such a provision has been sustained in Pennsylvania, but pronounced void in Connecticut, Ohio, and Maine.—11 *Wen.* 187.

An assignment void in part, as against the provision of a statute, is void in toto.—4 *Paige*, 24.

A bond may be assigned, but the assignee must sue upon it in the obligee's name, not in his own ; for being a chose in action, it is not assignable by the English law. But the assignee of a Scotch bond may maintain *indebitatus assumpsit* against the obligor in his own name.—*James v. Dunlop*, 8 *Term Rep.* 595. There being an express promise by the obligor to pay the assignee ; and so also may the assignee of an Irish judgment by *cognovit*.—3 *Term Rep.* 82.

14. Can an assignment be sustained, if it be made with the intent to hinder, delay, or defraud creditors ?

It cannot.—2 R. S. 137, § 1.

ASSUMPSIT.

1. What is *assumpsit* ?

It is an action whereby damages are recovered for the breach of any promise, contract, or undertaking.

These contracts are either expressed or implied ; both are equally grounds of this action, for the obligations of natural justice are equally strong as the most express promise in the eye of the law.

2. Of what two sorts are *assumpsits* ?

1st. *Indebitatus assumpsit*. 2d. *Special assumpsit*.

3. What is *indebitatus assumpsit* ?

It is in its nature an action of debt, and lies in cases where debt would lie, for in *indebitatus assumpsit* the plaintiff recovers not only the damages for the special loss, if any, but to the amount of the whole debt ; and therefore a recovery in this action, would be a good bar to an action of debt brought on the same contract.—*Slade's case*, 4 Co. 92.

4. What is a *special assumpsit* ?

A *special assumpsit* is that in which the damages are not in the nature of a debt, but as a compensation for injury.—4 Co. 94. b.

5. On what does an *assumpsit* lie ?

It lies to recover back money paid under mistake, or through the deceit of the other party.

As if an underwriter pay money on an insurance of a ship supposed to be lost, which afterwards arrives safe, he shall recover back the money so paid, &c.—2 Bur. 1010.

6. What ought there to be in every action on *assumpsit* ?

There ought to be a consideration, promise, and breach of promise.—1 Leon. 405.

7. Does the law distinguish between a general *indebitatus assumpsit* and a *special assumpsit* ?

Yes ; for though they come under the denominations of *actions on the case*, and the party is to be recompensed in damages alike in both, yet the first seems to be of a superior nature, and will lie in scarcely any case but where debt will lie ; but for a particular undertaking, or collateral

promise to discharge the debt, or duty of another, a special *assumpsit* must be brought.—*Bac. Ab. vol. 1. 337. (7th edn.)*

When one becomes legally indebted to another for goods sold, the law implies a promise that he will pay this debt; and if it be not paid, *indebitatus assumpsit* lies.—1 *Dawson Ab. 26.* And *indebitatus assumpsit* lies for goods sold and delivered to a stranger, *ad requisitionem* of the defendant.—*Id. 27.* But on *indebitatus assumpsit* for goods sold, you must formerly prove a price agreed on, otherwise the action would not lie; but now the plaintiff may recover in *indebitatus assumpsit*, either on an agreed price or a *quantum meruit*. In fact the cases are almost endless wherein this action lies.

ATTAINDER.

1. What is attainder *attincta* and *attinctura*?

It is the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequences by the common law, on pronouncing the sentence of death.

He is then called attainder, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man; for by anticipation of his punishment he is already dead in law.—3 *Inst. 213.*

This is after judgment; for there is great difference between a man convicted, and a man attainted; though they are frequently through inaccuracy compounded together; when judgment is once pronounced both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his favor. Upon judgment of death, and before the attainder of the criminal commences or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry, on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.—4 *Cow. 380.*

BARGAIN AND SALE.

A patentee of land, without personally entering upon it, has such seisin as may be transferred and continued by deed of bargain and sale, but if his seisin be interrupted by actual entry and adverse possession of another, he cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment.—*Clay v. White, 1 Munford's Rep. 162.*

1. Is an equity of redemption subject to sale on an execution on a judgment in Mississippi?

It is.—*Walker's Rep. 194.*

2. Is the interest of the mortgagee subject to sale on an execution?

It is not.—*lb.*

BAR.

1. Is the taking in *execution* the body of one of two *joint* obligors, a bar to an action against the other obligor?

It is not.—*Atwell's Adm'rs. v. Fowles*, 1 *Munford Rep.* 175.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

OF THE PARTIES TO A BILL.

1. What is a bill of exchange?

It is an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid; or it may be made payable to the bearer.—2 *Bl. Com.* 466.

2. Why is it usual in bills of exchange, to express that the value thereof hath been received by the drawer?

In order to show the consideration upon which the implied contract of repayment arises.—2 *Bl. Com.* 468.

3. Are the words "value received," absolutely necessary in bills and notes?

They are not. Formerly it has been considered doubtful; but the point is now fully settled that these words are not necessary; for as these instruments are always presumed to have been made on valuable considerations, words which import no more cannot be essential.—*White v. Ledwick*, K. B. *Hill*, 25, G. 3. *Bail Bills*, 34. *Barn. & C.* 674--5. *Barn. & C.* 360.

4. What are the parties to a bill of exchange called?

The person who makes the bill is called the drawer, he to whom it is addressed is called the drawee, and after he undertakes he is called the acceptor. The person to whom it is ordered to be paid is called the payee; and if he appoint another to receive the money that other is called the endorsee, as the payee is, with respect to him the endorser; any one who happens for the time to be in possession of the bill, is called the holder.

5. Who are the immediate parties to a bill?

The drawer, acceptor, endorser, and holder.—*Chitty on Bills*, 23.

6. How may a person become a party to a bill in a collateral way ?

By accepting, for the honor of the bill, or any particular endorser, in which case the acceptance is called an acceptance *supra protest*, and the person making it is styled the acceptor for the honor of him on whose account he comes forward. A person may likewise become a party to the instrument by paying it *supra protest*.—*Chitty on Bills*, 23.

7. What is the general rule with respect to the mode of becoming a party to a bill ?

That no person can become a party to a bill, unless his name appears on some part of it. However a man may become drawer, endorser, or acceptor, not only by his own immediate act, but also by the act of his agent, or by that of his partner.—*Chitty on Bills*, 23.

8. What essential qualities must a bill or check possess ?

First, that the instrument be made payable at all events, and dependent on no particular event or contingency ; and secondly, that it be for the payment of money only, and not for the payment of money and the performance of some other act,—without which it will not operate as an instrument, and will only be considered as a special agreement ; or in other words mere evidence of a contract, and consequently will not carry with it any internal evidence of a consideration, or be negotiable.—3 *Wills*, 213. 2 *Blac. Rep.* 1072.

9. Is a master who has empowered a servant to draw bills of exchange in his name, bound by acts done subsequently to leaving his service ?

He is, unless notice is given ; and it is incumbent on every employer to give notice of such fact to all his correspondents individually, notice in the Gazette not being sufficient.

10. How are bills of exchange to be expounded ?

Bills of exchange are like every other instrument, to be expounded in such manner as, if possible, to give effect to the intention of the parties. In cases in which the popular meaning of a phrase and the strict grammatical simplification of words differ, or in general wherever the contracting party attempts to make his escape through some ambiguity in expression which he used, it shall be construed according to the sense in which the party in whose favor it is, apprehended it. As in the case before Lord Macclesfield, where a man for past consideration gave a promissory note, in the beginning of which it is mentioned, to be given for twenty pounds borrowed money, but at the latter end were these words, "which I promise never to pay," it was decided that the payee might recover as on an instrument.—*Chitty on Bills*, 58.

Delivery of a bill to payee ; and effect thereof.

A bill of exchange is delivered in general by the drawer to the payee

and where it consists of several parts, as is usually the case with foreign bills, each ought to be delivered to the person in whose favor it was made, unless one part is forwarded to the drawee for acceptance, and in that case the rest must be so delivered. Were it otherwise, difficulties might arise in negotiating a bill, or obtaining payment of it, although in general one simple contract cannot be extinguished by another, a person taking a bill of exchange in satisfaction of a former debt, for which he has not a security of a higher nature than a bill, is not permitted afterwards to waive it and sue the person who gave it him for the original debt before the bill is due, unless the person delivering it knew it was of no value; for in such case the receipt of the bill amounts to an agreement to give the person delivering it credit for the length of time it has to run.—*Bayl.* 15. *Bul. N. P.* 182. 12 *Mod.* 517. 6 *T. R.* 52. 7 *T. R.* 64. *Chitty on Bills*, 62.

11. Upon delivery to the payee, is the obligation to which the drawer is subject, complete?

It is. By the very act of drawing a bill a man enters into a contract with the payee, and with every subsequent holder, fairly entitled to possession, that the person on whom he draws is capable of binding himself by his acceptance, that he is to be found at the place of which he is described to be, that if the bill be duly presented to him, he will accept in writing on the bill itself according to its tenor; and that he will pay it when it becomes due, if presented in proper time for that purpose. This engagement is in all its parts absolute and irrevocable.

12. Will a bill drawn or endorsed by an infant bind him?

It will not, though it be made for necessities. But he may, by a promise to pay the bill, made after he is twenty-one, render it as operative against him as if he had been of age at the time when the bill was made; and such promise need not be express, but may be inferred from acts, necessarily affording an inference that it was made.—1 *T. R.* 40. *Chitty on Bills*, 20.

13. What will discharge the surety?

Any alteration, however *bona fide*, by the creditor or principal of the original agreement, in reference to which the surety became responsible for the principal, clearly exonerates the surety not assenting thereto, from all liability. And it was held by Mr. J. Story, that it matters not that a surety may sustain no injury, a change in the contract or that it may be even for his benefit. He has a right to stand upon the very terms of his contract; and if a variation is made, it is fatal.—9 *Wheaton*, 680. See also *Wright v. Johnson*, 8 *Wend.* 512. *Bank of Washington v. Barrington*, 2 *Penn.* 27. 1 *Bas. & Pull.* 652. 2 *Idem.* 61, 3 *Id.* 36.

But receiving a part of the debt from the acceptor after the drawer has been duly fixed, works no prejudice to the holder's right against the drawer or endorsers. All that the rule requires is, that the holder shall not so deal with the acceptor of the bill, or maker of the note, by giving

time, or compounding, or giving credit, as to prejudice the rights of the other parties to the bill without their assent, in the exercise of their right of recourse against an acceptor.—3 *Kent*, 112.

It is a well settled point that a mere gratuitous forbearance, without any binding agreement or obligation to refrain from taking proceedings, cannot exonerate the surety at law or in equity. The doctrine that a mere delay to sue the principal, does not discharge a surety, is recognized in many cases, of which the following are a few only.—*Townsend v. Riddle*, 2 *N. Hamp.* 448. *Lenox v. Prout*, 3 *Wheaton*, 524. *M'Kenney v. Waller*, 1 *Leigh*, 434. *Wayne v. Kirby*, 2 *Bailey*, 551. *Treasurers v. Johnson*, 4 *M'Cord*, 458. *Shubrick v. Russel*, 1 *De*, 515. 1 *Black*, 392. 8 *Green*, 191. *Hoge v. Penn*, 1 *Cland*, 30. *Kennebec Bank v. Tuckerman*, 5 *Greenleaf*, 130. *Gahn v. Neimcewitz*, 11 *Wend*, 317, 318. *Reynolds v. Ward*, 5 *Wend*, 510. *Clagget v. Salmon*, 5 *Gill & John's* 314. *Stout v. Ashton*, 5 *Monro*, 252. *Norris v. Crumney*, 2 *Rand*, 323. *Freeman's Bank v. Rollins*, 13 *Maine*, 202.

14. Where a note is given by a partner in the name of the firm for money received by him individually, are the other members of the firm liable?

They are not. Unless the money is applied, for the use of the firm, with their knowledge and approbation.—*Whitaker v. Brown*, 11 *Wend*, 75. See *Church v. Sparrow*, 5 *Wend*, 223.

In an action against a firm on a note made by one partner in the partnership name, it is not incumbent on the plaintiff in the first instance to show that the note was given for a partnership transaction.—6 *Wend*, 615. 2 *Binn*, 160.

That it was given for the individual debt of one of the partners, is matter of defence.—*Doty v. Bates*, 11 *John*, 544.

But partners are all liable for articles furnished for the benefit of the firm, though the vendor does not know of the existence of the firm, and though he supposes himself dealing with, and giving credit to, an individual partner, by charging him alone in his books.—*Renolds v. Cleveland*, 4 *Cowen*, 282.

15. Is a note discounted as a security for money lent by the members of an unlawful association, valid?

It is not. It is void, but the contract of loan remains good, on which an action will lie by the lenders to recover it of the borrower.—*Utica Ins. Co. v. Kip*, 8 *Cowen*, 20.

16. Is a note made by an administrator as administrator, by which he promises to pay, &c., for value received by the intestate and his heirs valid?

It is not. It is void for want of a consideration.—*Ten Eyck v. Vanderpool*, 8 *J. R.* 120.

17. When does the law adjudge a note payable, if no time of payment be expressed ?

Immediately, and parol evidence is inadmissible to show a different time of payment.—*Thompson v. Ketchan*, 8 *John's Rep.* 189. *Bacon v. Page*, 1 *Com. Rep.* 404. So to show a note payable in 1810, was so made by mistake, for 1811.—*Fitzhugh v. Runcon*, 8 *John's Rep.* 375.

Such notes are not entitled to grace.—*Cranmer v. Harrison*, 2 *M'Cord's Rep.* 246.

It is a part of the contract between the maker, and payee of a negotiable note, that the former will make payment to the legal holder, when the note comes to maturity ; and he has no right to pay it to any one before it comes to maturity.—*The Saving's Bank of New Haven v. Bates*, 8 *Conn. Rep.* 505.

There A. on the 2d of September, made his negotiable note, payable sixty days after date, which was immediately discounted by the Eagle Bank ; and on the 16th of September, that institution stopped payment, being insolvent ; and on the 2d of November, the sixty-first day after the date of the note, A. being holder of the bills of the Eagle Bank to the amount of his note, tendered them to the Bank in satisfaction of his note, which was refused, on the ground that the note was not then due ; he then gave notice that when the note should become due, he should again present the bills for the same purpose.

18. What is the effect of a bill made payable to a fictitious person and endorsed in the name of the fictitious payee ?

It may be considered as a bill payable to bearer. And a *bona fide* holder ignorant of that fact, may recover on it, against all prior parties, who were privy to the transaction.—2 *H. Bl.* 178—288. 3 *T. R.* 174—182—481. 1 *Camp.* 130. 19 *Ves.* 311.

In a case where the drawer and payee were fictitious persons, the acceptor was held liable to a *bona fide* holder.—10 *B. & C.* 468. *S. C.* 11. *E. C. L. R.*, 116. Vide as to parties to a bill, *Chitty Bills*, 15 to 76. (*Ed. of 1836.*)

OF ACCEPTANCE.

1. What is an acceptance of a bill of exchange ?

It is an agreement to pay the bill according to the tenor of the acceptance, the circumstances which generally concur in an acceptance, are that the party to whom it is addressed binds himself to the payment, after the bill has issued, before it has become due and according to its tenor, by either subscribing his name or writing the words accepts or accepted A. B. But a man may be bound as acceptor without any of these circumstances. An acceptance may be either verbal or written, if the former, it may be either on the bill itself, or in some collateral writing as a letter &c.—*Stra.* 648.

2. To constitute an acceptance, need there be a bill in existence at the time?

There need not. An agreement to accept in future a bill not in existence at the time of such agreement, will have the same operation as the acceptance of a bill subsequent to its formation.—*Chitty on Bills*, 73.

By the revised statutes of New York, an unconditional promise in writing, to accept a bill before it is drawn, is a sufficient acceptance in favor of any one who on the strength of it has received a bill for a valuable consideration.

3. What will amount to an acceptance of a bill?

A very small matter will amount to an acceptance, and any words will be sufficient for that purpose which show the party's assent or agreement to pay the bill; as if upon the tender thereof to him, he subscribes accepted, or accepted by me A. B., or I accept the bill, &c., these clearly amount to an acceptance.—*Molloy*, Book 2, c. 10, § 15. If the party underwrites the bill presented such a day, or only the day of the month; this is such an acknowledgment of bill as amounts to an acceptance.—*Comb.* 401. So if he ordered a direction to another person to pay it.—*Bull. N. P.* 270.

So if he says, leave your bill with me and I will accept it, or call for it to-morrow and it shall be accepted. According to the custom of merchants, these words will as effectually bind, as if the party had actually signed or subscribed his name according to the usual manner. But if a man says, leave your bill with me, I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill should be accepted; this does not amount to a complete acceptance; for the mention of his book and accounts shows plainly that he intended only to accept the bill, in case he had effects of the drawee in his hands. And so it was ruled by the Lord Chief Justice Hale, *Guilhall*.—*Molloy*, Book, 2, c. 10, § 20.

An answer received at the house of the drawee that the bill would be taken up when due, does not amount to an acceptance unless it can be shown that the answer was given by the drawee or by his authority.—1 *Esp.* 209.

4. Does a bare promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date, for the amount of his demand, he should then have the money and would pay it, amount in law to an acceptance when drawn?

It does not.—1 *E. R.* 98.

A promise to accept a bill thereafter to be drawn, specifying the amount and time of the payment, so as to leave no reasonable doubt as to the identity of the bill intended to be accepted, is, if shown to a third person, who on the faith of such promise, takes the bill for a valuable consideration, in point of law, binding on the person who makes the promise. But if the sum be fraudulently altered after acceptance, then the acceptor is liable only to the extent of the sum for which he really accepted, and

holder, however *bona fide*, can recover no more, and must protest as to the surplus.—1 *Pardessus*, 467. 10 *Johns. Rep.* 213. 2 *Gall.* 238.

5. What is the rule of law as to the time on which a bill payable at sight, or by a given time, must be presented to the drawer for acceptance?

There is no precise time fixed. A bill payable at a given time after date need not be presented for acceptance before the day of payment; but if presented, and acceptance be refused, it is dishonored, and notice must then be given to the drawer.—3 *Kent*, 82. 1 *Peter's U. S. Rep.* 25. But with respect to the time when bills payable at or after sight should be presented for acceptance, the only rule, whether the bill be foreign or inland, or whether payable at sight or at so many days after sight, or in any other manner, is that they must be presented within a reasonable time.—*H. Bl.*, 569. And as the drawer may sustain a loss by the holder's keeping it any great length of time, it is advisable in all cases to present it as soon as possible; but he is not obliged to send it by the first opportunity.—*Ibid.* 27.

6. Is the mere answer of the merchant to the drawer "that he will duly honor his bill," an acceptance?

It is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by endorsement, but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer.—*Cowp.* 572-4.

An agreement to accept may be expressed in such terms, as to put a third person in a better condition than the drawer. If one meaning to give credit to another, make an absolute promise to accept his bill, the drawer or any other person may show such promise on the exchange to procure credit; and a third person advancing his money on it, has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor.—*Doug.* 286, 299.

A foreign bill was drawn on the defendant, and being returned for want of acceptance, the defendant said, that if the bill came back again he would pay it; this was ruled a good acceptance.

7. When there are two joint traders, and a bill is drawn on both of them, does the acceptance of one bind the other?

Yes, if it concern the joint trade; but it is otherwise if it concern the acceptor only, in a distinct interest and respect.—1 *Salk.* 126. 1 *Lord Raymond*, 175. See 7 *Term Rep.* 207. 1 *Barn. & C.* 146. 13 *East*, 175. *Bac. Abr.* vol. 5, 402.

In foreign bills it has always been understood a collateral or parol acceptance was sufficient.—1 *Stra.* 648. 3 *Burr.* 1674. *Hardw.* 75; and it is now settled that such acceptance is also good in case of inland bills as by words.—*Limley v. Palmer*, 2 *Str.* 1000, *by letter*. 1 *Atk.* 717, (613;) but now by the 1 & 2 *G. 4*, c. 78, § 2, no acceptance of an inland bill shall be sufficient to charge any person unless in writing.

8. To what does a promise to give notice to a party when he might draw a bill amount?

It amounts to an undertaking to accept the bill when drawn in pursuance thereof.—2 *Marsh*, 41. *Taunton*, 440. Except the communication is to another than the party who is to receive the bill, and who is thereby induced to take it.—*Holt*, 181. 4 *Camp*. 393.

A foreign bill was drawn on the defendant, and being returned for want of acceptance the defendant said, that if the bill came back again he would pay it; this was ruled a good acceptance.

9. If a merchant be desired to accept a bill on the account of another, and to draw on a third in order to reimburse himself, and in consequence he draws a bill on that third person, will the bare act of drawing this bill amount to an acceptance of the other?

It will not.—1 *Term Rep.* 269, and see 4 *Maule*, & S. 303. 2 *Barn. & Ald.* 113. *Bac. Abr. Merchant Bills*, &c., M. 7th ed.

An agreement to accept or honor a bill will in many cases be equivalent to an acceptance, and whether that agreement be merely verbal or in writing is immaterial. If A having given or intending to give a credit to B, write to C, to know whether he will accept such bills as shall be drawn on him to B's account, and C return for answer that he will accept them, this is equivalent to an acceptance, and a subsequent prohibition to draw on him, on B's account, will be of no avail, if in fact previous to that prohibition the credit has been given.—3 *Burr.* 1663.

10. What if a bill be accepted, and the person who accepts the same happens to die before the time of payment?

In such case there must be a demand of his executors or administrators; and on non-payment a protest is to be made, although the money becomes due before there can be administration, &c.

11. Is a mere acceptance without delivery to the holder, sufficient to make the contract binding?

It is not.—1 *D. & R.* 533. *S. C.* 5 *B. & A.* 474.

12. Is it necessary that any consideration should be shown for an acceptance, or an agreement to accept?

It is not, and a valid agreement to accept may be declared on, as an acceptance.—12 *Wend.* 593. 7 *Wend.* 227.

13. What will discharge the acceptor?

Nothing short of the statute of limitation, or payment, or release, or an express declaration of the holder; he is bound like the maker of a note as principal debtor.

14. What is meant by a conditional or special acceptance?

Any acceptance varying the absolute terms of the bill, either in the sum, the time, the place, or the mode of payment. The holder is not bound to receive such an acceptance, but if he does, the acceptor is not liable for more than he has undertaken.—3 *Kent*, 84.

15. How is the French law on the subject of presentment for acceptance?

It has prescribed that presentment must be made within certain specified periods, according to the places at which they are drawn.—1 *Pardessus*, 434. 5 *Code du Commerce*, No. 160. 2 *Pardessus*, 391.

And it has also provided against a purposely hasty presentment and demand of acceptance, before the drawee can have received advice, and that the holder must allow as many days as there are five leagues, or fifteen miles, between the place of drawing and the place on which the bill is drawn.—1 *Pardessus*, 382.

16. What circumstances will go to excuse delay in making presentment for acceptance?

Illness or war having been declared, or from the political state of the country, or by other reasonable cause or action, not attributable to the misconduct of the holder.—2 *Smith's Rep.* 223.

No absolute rule can be laid down as to the time when a bill must be presented for acceptance. The only rule is, that it must be presented within a reasonable time, and what is a reasonable time depends upon the circumstance of each particular case; and it is a question of law under the circumstances of each particular case, and not a question of fact.—3 *Johns. Cases*, 5, 259. 1 *Peter's Rep.* 578—583. 4 *Mason*, 336. 6 *Cowen*, 484. 7 *Cowen*, 705.

A bill of exchange was drawn in the city of New-York, December 12th, 1822, payable at three days' sight, to be borne by the payee, who was then at New-York, to Richmond, Virginia, where the drawees resided; but in consequence of the ill health of the bearer, the bill was not presented until the 10th of January, 1823, when acceptance was refused; the drawer had due notice of non-acceptance and non-payment; it was held under these circumstances, that the delay of presentment was not unreasonable.—7 *Cowen*, 705.

17. Does the law require a bill of exchange payable in a given number of days after date, to be presented for acceptance before the day of payment?

It does not.—1 *Peters' Rep.* 25. 2 *Ibid.* 170.

18. Within what time must acceptance be made after presentment?

Within twenty-four hours, or in default thereof it is liable to be treated as dishonored.—*Chitty on Bills*, 72.

If the drawee keep the bill a great length of time, contrary to his usual course of dealing, an acceptance may be implied, for this is giving

credit to the bill and inducing the holder to consider it accepted.—1 *Campb.* 425.

19. By what rules is accommodation paper governed ?

By the same rules as other paper, according to the latest and best doctrine both in England and in this country.—5 *Taunton*, 192. 6 *Doug. Parl. Cas.* 234. 9 *Serj. & Rawle*, 229. 6 *Cowan*, 484.

20. What if the drawee cannot be found at the place where the bill states him to reside ?

If it appear that he never lived there, or has absconded; the bill is to be considered as dishonored. But if he has only removed, it is incumbent on the holder to endeavor to find to what place he has removed, and to make the presentment there.—2 *Stark.* 1087.

The maker of a note shut up his house before the note became due, and in an action against the endorser, one question was, whether the plaintiff had shown sufficient, in proving that the house was shut up. And *Lee, C. J.*, thought not; but that he should have given in evidence, that he had inquired after the drawee, or attempted to find him out. And he should in all cases make every possible inquiry after the drawee, and if it be in his power, to present the bill to him; though it will be unnecessary to attempt to make such a presentment, if the drawee has left the kingdom, in which case it will be sufficient to present the bill at his house.—2 *Esp. Rep.* 211.

21. What should the holder do on presentment, if it appear that the drawee be dead ?

He should inquire after his personal representative, and if he live within a reasonable distance present the bill to him.—*Bayley on Bills*, 128.

22. By whom, and in what manner, may acceptance *supra protest* be made ?

In the first place, the drawee, though he may not choose to accept on the account of him in whose favor he is advised the bill is drawn, may nevertheless accept for the honor of the drawer; or, in case he does not choose to accept on account of the drawer, he may accept for the honor of the endorser, in which latter case he should immediately send the protest on which he made the acceptance to the endorser.—*Beaves, pl.* 33, 34. *Chitty on Bills*, 103.

Where the drawee will not accept the bill, any other person may, after refusal by the drawee, and after protest, accept it for the honor of the bill, or of the drawer, or of any particular endorser, and even a bill previously accepted *supra protest*, may by another person be accepted *supra protest* in honor of some particular person.—*Beaves, pl.* 42. *Chit'y on Bills*, 104.

23. Must the acceptor *supra protest* cause a formal protest for non-payment to be made before he pays the money ?

He must ; unless the person for whose honor such an acceptance is made, signify his approbation.—*Evans' Essays on Bills of Exchange*, 29.

With respect to bills payable to a certain person or order, or to the order of a certain person, there never seems to have been any doubt respecting their negotiability ; and though bills payable to bearer, to a certain person or bearer, were formerly thought not to be negotiable, and considered as mere choses in action, because, as it was said in several cases, such instruments contained no authority to assign, so as to enable the assignee to demand payment of the drawee, but an indemnity to the drawee in case he should pay him. Yet it has been adjudged that the decisions tending to support this doctrine, and the reason on which they were founded, were equally erroneous. It is therefore now well established by usage and decisions, that bills payable to order or to bearer, are equally negotiable from hand to hand *ad infinitum*, and that the transfer vests in the assignee a right of action in his own name. But in general, unless these or some other words empowering the proprietor of the bill to assign it are inserted therein, it cannot be transferred so as to give the assignee a right of action against any of the parties to the instrument, except the assignor.—*Chitty on Bills*, 108.

24. What are the obligations and rights of an acceptor *supra protest* ?

He subjects himself to the same obligations as if the bill had been directed to him.—3 *Kent*, 83. And if he takes up the bill for the honor of an endorser, he stands in the light of an endorsee paying full value for the bill, and has the same remedies to which an endorsee would be entitled, against all prior parties, and he can sue the drawer and endorser.—*Mulford v. Walcott*, 1 *Ld. Raym.* 574. 1 *Esp. Ni. Pri. Rep.* 112. *Bayley on Bills*, 209. 3 *Kent*, 84.

25. What is the mode of accepting a bill in New-York ?

It is required to be in writing, signed by the acceptor or his agent.—*Rev. Stat.* 786, § 7.

26. What if the drawee destroy the bill, or refuse to return it ?

In such a case he shall be deemed to have accepted it.—1 *Rev. Stat.* 769, § 11.

The drawee may annex what conditions he please to his acceptance, as to time, place, and sum, and he will be bound only according to the terms of his undertaking. The payee, or holder, however, is not bound to receive such acceptance, but may protest the same for non-acceptance.

If the drawee alters the bill on acceptance, he vacates it as against the drawer and all the prior endorsers ; but if the holder acquiesces, it is good as between him and the acceptor.—1 *Taunton*, 420.

27. Is an acceptance valid against the acceptor, when written on any paper other than the bill itself ?

It is not, except in favor of a person to whom such acceptance shall have been shown, and who on the faith of it shall have received the bill for a valuable consideration.—1 *R. S.* 768, § 7.

Where the drawee refuses to accept absolutely, and makes conditional acceptance, the terms of which are complied with, no notice of the manner in which the bill has been accepted is necessary.

28. Where the drawee undertakes by his acceptance to pay only a part of the bill, are the parties to the bill bound to the extent of his acceptance?

They are; and an omission to give notice of such partial acceptance, does not discharge them from their obligation to that amount.—*Chitty on Bills*, 90.

The demand is the material thing, which must be done by a notary, and it cannot be done by his clerk.—*Chitty on Bills*, 91. *Holt*, 121.

It has been adjudged that an alteration made by the holder of a bill, of a partial acceptance into an absolute one, will not be a waiver or discharge of the acceptor's liability under his partial acceptance.

29. When the acceptance is made after the time of payment is elapsed, how is it considered?

It is considered as a general promise to pay the money, and if it be to pay according to the tenor of the bill, this shall not invalidate the acceptance, though the time being past, it be impossible to pay according to the tenor of the bill, but these words shall be rejected as surplusage.—4 *Salk.* 127-9. 1 *Ld. Raym.* 364, 574. 12 *Mod.* 214, 410. *Carth.* 459.

30. What if acceptance be refused, and a bill returned?

It is notice to the drawer of the refusal of the drawee; and then the period when the debt of the former is to be considered as contracted, is the moment he draws the bill; and an action may immediately be commenced against him; though the regular time of payment according to the tenor of the bill, be not arrived. For the drawee not having given credit, which was the ground of the contract, what the drawer has undertaken has not been performed.—*Doug.*

31. May an acceptance be made by an agent?

It may. But it is incumbent on him if required by the holder to show his authority, and if he do not, the holder may consider it as dishonored, and proceed accordingly. And it may perhaps be doubtful whether the holder is in any case bound to acquiesce in an acceptance by an agent, as it multiplies the proof which he will be obliged to adduce in case he is compelled to bring an action on the bill.—*Chitty on Bills*, 72. *Esp. Ca. Ni. Pri.* 155.

It has been adjudged that if a bill is made payable in a city or large town generally, it must be made payable by the acceptance at some par-

ticular place there, and if not thus, the holder may protest it.—*Chitty on Bills*, 76. *Comyns*, 75. *Ld. Raym.*, 574.

32. Is the acceptor of a bill liable to an endorser for the costs of an action brought by the holder against the endorser?

He is not. Where there is no priority or promise between them independently of the bill.—*Dawson v. Morgan*, 9 *Barn. & Cres.* 618.

33. What is the effect of an order, drawn by a debtor having funds in the hands of the drawee; as regards those funds?

It is, after acceptance, an assignment of those to the extent of the order, and the drawee cannot afterwards legally part with such funds, to the drawer or any other person.—*Peyton v. Hallet*, 1 *Caine's Rep.* 379.

The drawer who has agreed generally to accept bills from a correspondent continues bound until notice not to draw is given and received, although he has no funds of the drawer in his hands.—2 *Wash. C. C. Rep.* 132.

34. Is the drawee, if he be indebted to the drawer, in the full amount, legally bound to accept the bill?

He is not, even if funds have been remitted to him for the express purpose; nor is he liable to an action for the consequence of his refusal.—1 *Pardessus*, 384. In this respect the situation of an ordinary debtor or agent differs from that of a banker who is liable to an action if he should refuse, having sufficient money on hand, to honor the check of his customer.—*Marzetti v. Williams*, 1 *Bar. & Adolp.* p. 415.

In France, the holder of an accepted bill, may, when at maturity, sue the drawee in the name of the drawer, for the funds in hand, the drawing being considered equivalent to an assignment of such funds to the use of the holder, and the drawer's intervening failure does not defeat the right.—1 *Pardessus*, 429.

But in commercial transactions, from prior intercourse and dealings between the parties, an engagement to accept may be inferred.—1 *Pardessus*, 389. Where the drawee has money in hand, very slight evidence will support the presumption of a contract to accept.—*Laing v. Barclay*, 1 *Barn. & Cress.* 398.

35. If the drawee, being asked if the acceptance be his hand-writing, answers that it is, and that it will be duly paid, can he afterwards set up as a defence, forgery of his name?

He cannot, for he has accredited the bill and induced another to take it.—4 *Esp. Rep.* 226. The plaintiff before he took the bill sent a person with it to the defendant, to inquire whether the acceptance upon it were his hand-writing; the defendant said it was, and that it would be duly paid. He now offered evidence of the effectual forgery of the acceptance; but Lord Ellenborough held, that the proof would not discharge the defendant; and after having so accredited the bill, and induced a person to take it, he was bound.

36. Is an agent who has neglected to present a bill for acceptance, liable to the person who employed him ?

If the affairs of the drawer become deranged, he is.—*Pot.* 128. *Mar.*

46. *Chitty on Bills*, 68.

If the drawee of a bill goes abroad leaving an agent in England with power to accept bills, who accepts a bill for him, when due it must be presented to the agent for payment if the drawee continue absent.—*2 Taunt.* 206.

37. What is it necessary to prove in an action on a bill of exchange by an executor, and upon a debt laid to be due to the testator ?

It is necessary to prove that the acceptance was in the testator's lifetime.—*12 Mod.* 447.

ON THE TRANSFER OF BILLS AND CHECKS.

1. How, and by whom, may a valid transfer of a bill or check be made ?

It is made by endorsement, which may be made by the payee, or his agent. In case of a bill made or endorsed, to a *feme sole*, who afterwards marries, the right to endorse belongs to her husband. So, the assignee of an insolvent payee, or the executor or administrator of a deceased payee, are entitled to endorse the paper. And if a bill be made to a mercantile house consisting of several partners, an endorsement by any one of the partners is deemed the act of the firm. If the bill be made payable to A, for the use of B, the legal title is in A, and he must endorse it. The bill cannot be endorsed for a part of the contents only, unless the residue has been extinguished. A note endorsed in blank is like one payable to bearer, and passes by delivery, and the holder may constitute himself, or any other person, assignee of the bill. A bill originally negotiable continues so, in the hands of the endorsee, unless restrained by a special endorsement.—*3 Kent*, 89. *Edie v. East India Company*, *2 Burr.* 1216. *2 Peter's U. S. Rep.* 239. *5 Greenleaf*, 261. *Thompson v. Wilson*, *2 New Hamp. Rep.* 291.

2. When may a transfer be made ?

Usually after acceptance and before payment ; but although the term transfer, like the term acceptance, supposes a pre-existing bill, a transfer, like an acceptance, may in general be made previous to the bill being complete. Thus it has been adjudged, that if a man endorses his name on a blank piece of paper, such an endorsement will operate as a *carte blanche*, or letter of credit for an indefinite amount, and will bind the endorsee for any sum to be paid at any time, which the person to whom he intrusts the instrument chooses to insert in it.—*Doug.* 519. *H. Bl.* 313, 316, 319.

3. What is the distinction between the effect of a transfer made previously to the time when a bill is due, and one made after that time ?

In the first case it is said that the transfer carries on the face of it no suspicion, and the assignee receives it on its own intrinsic credit, nor is he bound to inquire into any circumstances existing between the assignor and the previous parties to the bill, as he is not affected by them. But where a transfer is made after it is due, whether by endorsement or mere delivery, the case is otherwise, and the assignee takes the instrument subject to all the equitable rights existing between the persons from whom he receives it, and the antecedent parties to the bill.

If the holder of a foreign or inland bill of exchange, or check, transferable by mere delivery, loses or is robbed of it, whilst in his possession, and it gets into the hands of a person who was not aware of the loss, for a good consideration, previously to its being due, such person, notwithstanding he derived his interest in the instrument from the person who found or stole it, may maintain an action against the acceptor or other parties to the instrument; and the original holder, who lost it, will consequently forfeit all right of action.—*Chitty on Bills*, 124.

4. If the holder of a bill or note die, who may endorse it?

His executors or administrators may endorse it; and their endorsees maintain an action in the same manner as if the endorsement had been made by the testator or intestate. But on their endorsement they are liable personally, to the subsequent parties, for they cannot charge the effects of the testator. They may also be endorser of a bill or note in their quality of executors or administrators; as where they receive one from their testator or intestate, and in that character may bring an action on it, against the acceptor, or any of the other parties.—3 *Wills*. 1. 1 *Str.* 1260. 2 *Barnes*, 137. 2 *Burr*, 1225. 1 *Term Rep.* 487.

5. Will a transfer by delivery, without endorsement, for a valuable consideration, impose an obligation upon the person making it, to the person in whose favor it is made, similar to that of a transfer by endorsement?

It will. But as, on a transfer by delivery, the assignor's name is not on the instrument, there is no privity of contract between him and any assignee, becoming such after the assignment by himself, and consequently, no person but his immediate assignee can maintain an action against him.—*Lord Raymond*, 928. 12 *Mod. Rep.* 408, 521. 1 *Str.* 415, 416. *Contra*, 12 *Mod. Rep.* 517.

In an action by the endorsee against the endorser of a foreign bill of exchange, the defendant is liable for damages, according to the law of the place where the bill was endorsed.—*Cranch, Rep.* 221. 2 *Condensed Rep.* 351.

6. If a blank note or check be endorsed, to what will it bind the endorser?

It will bind the endorser to any sum, or time of payment, which the person to whom he intrusts the paper, chooses to insert in it.—*Doug.* 514.

7. If the drawee of a note or acceptor of a bill be sued by the en-

endorsee, and the bail pay the debt and costs, does this discharge the endorser?

Yes; this absolutely discharges the endorser, as much as if the principal had paid the note or bill, and the bail cannot afterwards recover against the endorser in the name of the endorsee.—1 *Wills*, 46.

8. If a note purport to be given by two, and signed only by one, will a declaration generally, as on a note, by that one who signed, it be good?

It will; for the legal operation of such a note is, that he who signed it, promised to pay.—1 *Burr.* 323.

On a note jointly and severally, a declaration against one, in the terms of the note, will be good.—*Burchell v. Slocock*, 2 *Lord Raymond*, 1545. So on a note to pay jointly or severally.—*Cowp.* 832, contrary to former determinations.

9. In an action by an endorsee against an endorser, is it necessary to prove either the hand of the drawer or acceptor, or of any endorser before him, against whom the action is brought?

In such case it is not necessary to prove the hand-writing of either; every endorser being with respect to subsequent endorsees or holders a new drawer.—1 *Lord Raymond*, 174. *Stra.* 444. 2 *Burr.* 675. Where an action is by one endorser, who has paid the money, proof must be given of the payment.—1 *Lord Raymond*, 743.

10. Is a banker's check negotiable?

It is as much so as a bill of exchange.—7 *T. R.* 423. *Chitty on Bills*, 109.

11. In case of a bill payable to A for the use of B, in whom does the right of transfer lie?

In A only, for B has only an equitable interest.—*Chitty on Bills*, 12.

In general, a valid transfer can only be made by the payee or other person who is legally interested in the instrument, or his agent, and consequently, an endorsement by one of the same name, is inoperative, although the person entitled to transfer, was not particularly described in it.—4 *T. R.* 28. 1 *H. Bl.* 607. *Burr.* 1516. *Chitty on Bills*, 110.

12. When a bill is endorsed in full, can the endorsee sue in the name of the payee?

He cannot.—But if, after such endorsement, it comes back in due course of commercial dealing into the payee's hands, he may strike out the endorsement and sue.—1 *Gill & John*, 175. 3 *Blackf.* 437. *Smith v. Runnels, Walker*, 144.

13. Is it competent for the defendant to prove, in an action by the holder

of a note against the endorser, that the note was put into circulation by the drawer, fraudulently, and without his knowledge ?

It is.—*Lights v. Brenner*, 14 Serg. & Rawle, 127. *Evans v. Smith*, 4 Binn. 366. *Perry v. Cramont*, 1 Washington Circuit Court Reports, 206.

Where the maker of a note shows that it was put in circulation by force of fraud, the *onus* is thrown on the holder.—*Rogers v. Morton*, 12 Wend. 484. *Vallet v. Parker*, 6 Wend. 615. *Payne v. Cutler*, 13 Wend. 605.

The word “renewal,” written on the margin of a note endorsed for accommodation of the maker, is enough, to put the holder on his guard, unless erased so as to escape the attention of ordinary prudence.—*Hall v. Hall*, 8 Com. 336.

But a transfer by delivery merely, although a few days before the note was due, by the payee, who told the endorser he must take it at his own risk, is not evidence of notice.—*Ib.*

It is not incumbent on the defendant to show full and certain knowledge of the want or failure of consideration, if the facts were such as to put the holder on his guard.—*Cane v. Baldwin*, 12 Pick. 545.

The doctrine that a want or failure of consideration may be set up between the original parties to a bill or note, or a holder claiming by endorsement after it has become due, is generally recognized throughout the United States.—*Deniston v. Bacon*, 10 Johns. Rep. 198. *Woodhull v. Holmes*, 10 Johns. Rep. 236. *Frisbee v. Hoffnagle*, 11 Johns. Rep. 50.

14. May a bill payable to the order of the drawer, and not endorsed, be assigned for a valuable consideration, by delivery only ?

It may ; and an action for the benefit of the assignee will lie against the acceptor in the name of the drawer, as on a bill payable to himself.—*Fitcome v. Thomas*, 5 Greenleaf, 282. And though a check be transferred to two persons, as collateral security for two several debts due to them respectively, yet one alone may sue upon it, and possession by him is *prima facie* evidence that the interest of the other is assigned to him.—6 Cow. 484.

15. May not a negotiable instrument be so endorsed as to exempt the endorser from liability ?

It may ; as if the endorser should add, “at his own risk, or without recourse to me.” In that case the maker or acceptor, and prior endorsers, would be holden, according to the rules and usages of commercial paper, but the immediate endorser would be exempted from responsibility by the special contract.—*Dall., J., in Goupy v. Harden*, 7 Taunton's Rep. 163. *Rice v. Hems*, 3 Mass. Rep. 225. *Wilch v. Lind*, 7 Cranch's Rep. 159. *Bell's Com. on the Scotch Law*, vol. 1, 412.

16. What if an agent having money in his hands belonging to his principal, purchases with it a bill of exchange, which he endorses specially

to his principal ; the latter at the time of the endorsement was dead, but the fact was not known to the agent ?

This was the case in *Murry v. East India Company*, 5 Barn. & Ald. 204. It was held, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character ; it was holden, also, that the administrator was only entitled to recover interest upon the bill accepted after the death of the testator, from the time of demand of payment made by the administrator, and not from the time when the bill became due.

17. Is not the endorsement of a note, not negotiable, in the nature of a guaranty ?

It is ; and requires no previous demand of the maker and notice of non-payment.—8 *Wend.* 403.

18. Is it not a general principle, that all contracts, as to their nature, validity, and construction, are governed by the *lex loci contractus* ?

It is ; unless they had reference in respect to the performance of them to the laws of other places, and in that case they are to be governed by those laws ; and, as the endorsement is equivalent to a new contract as between the parties to it, the note may be regulated by the laws of one place, and the endorsement by those of another. This is the doctrine which has been amply recognized in England, and in this country, and it constitutes a part of the code of international law.—3 *Kent*, 76.

19. How is possession of negotiable paper, payable to bearer or endorsed in blank, regarded ?

It is *prima facie* evidence of property in such paper ; and such a *bona fide* holder can recover upon the paper, though it came to him from a person who had stolen or robbed it from the owner, provided he took it innocently in the course of trade, for a valuable consideration, under circumstances of due caution ; and he need not account for his possession of it unless suspicion be raised.—3 *Kent*, 80. *Miller v. Race*, 1 *Burr. Rep.* 452. *Grant v. Vaughan*, 3 *Burr. Rep.* 1516. *Peacock v. Rhodes*, *Doug. Rep.* 613. 2 *Campl. N. P.* 5. 13 *East's Rep.* 135. *Cruger v. Armstrong*, 3 *Johns. Cas.* 5. *Thurston v. McKown*, 7 *Mass. Rep.* 428. So much protection, for the sake of trade, is given to the holder of negotiable paper, who receives it fairly in the way of business, that he can recover upon it though it has been paid, if he received it before it fell due.—3 *Kent*, 81.

Where a note was given to a married woman, who lived separate, it was held to become the property of the husband, although he never assented.—*Swann v. Gage*, 1 *Hayw.* 3. *Brown v. Langford*, 1 *Bilb.* 497.

A promissory note may be purchased without endorsement, as well after as before suit brought ; and the suit may be carried on without entering the use.—*Williamson v. Allen*, 2 *Gill. & John.* 344.

A blank endorsement over which is written “without recourse to me,”

does not prevent the payee from suing in his own name.—*Thornton, v. Moody*, 2 Fairf. 253.

20. What if a trader delivers a bill for a valuable consideration to another before an act of bankruptcy, and forgets to endorse it?

He may endorse it after his bankruptcy.—*Peak*, 50. *Chitty on Bills*, 111.

21. What is the effect of payment?

By payment the contract of the parties to a bill generally ceases, at least so far as to prevent their being subject to new engagements;—an endorsement cannot be made after it, so as to affect any of the parties except the person making it, and therefore in an action on a bill at the suit of the endorsee against the acceptor, where it appeared that the drawer had paid the bill and had afterwards endorsed it to the plaintiff, it was decided that such endorsement could not vest in the plaintiff any right of action against the acceptor.—1 *H. B.* 89. 4 *T. R.* 270.

22. Is the negotiable quality of a note destroyed by advancing the money and taking it up?

It is not; unless it is done with the intention of extinguishing the note.—*Havens v. Huntington*, 1. *Cow.* 387.

23. Will a note assigned, where the note is retained in the hands of the assignor, until his death, vest any interest in the assignee?

It will not.—*Clark v. Boyd*, *Ohio Rep. Cond.* 250.

Where a creditor receives the transfer of a negotiable note in payment of a precedent debt, he takes it, although transferred to him before maturity, subject to all equities existing between the original parties.—*Rosa v. Brotherson*, 10 *Wend. Rep.* 85.

Though a promissory note, not payable to order, is not assignable so as to vest the legal interest in another person, yet the assignment of such note transfers the equitable title, which will be recognized both in a court of equity, and in a court of law, and fully protected.—*Lyon v. Summers*, 7 *Conn. Rep.* 399.

To give effect to this doctrine is the object of the Conn. statute of May 23d, 22, c. 12, § 1.—*Ib.*

24. Is receiving the transfer of a note as collateral security for the payment of a pre-existing debt, taking it in the ordinary course of trade, and for a valuable consideration, as between the creditor and an accommodation endorser?

It is not.—*Wardell and others v. Howell*, 9 *Wend.* 170.

25. Will the assignment of a part of a demand, due on a note, give a right of action to the assignee, as endorsee?

It will not, neither against the maker nor the payee.—6 *Wen.* 637.

26. May not a note, over due, and dishonored, still be negotiated?

It may; subject to all the equities between the original parties.—*Havens v. Huntington*, 1 *Cow.* 387.

But if the maker has confessed judgment on the note, the court will not set aside the judgment in order to let in such equitable defence, especially where the original parties are in *pari delicto*.—*Sebring v. Rathburn*, 1 *J. C.* 331.

A note, void for want of consideration, cannot be enforced by an assignee having full knowledge of the facts.—*Rumsey v. Leek*, 5 *Wend. Rep.* 20.

An assignee of a chose in action will be protected in a court of law, against the acts and declaration of the assignor, subsequent to the assignment.—*Kimbol v. Huntington*, 10 *Wend. Rep.* 675.

An action in favor of the endorsee of a promissory note, by a citizen of one state, against the endorser, a citizen of another state, may be brought in the circuit court of the U. S., though the maker and payee of such note are citizens of the same state.—*Day*, 3.

Though a note be void against the maker, it may be good against an endorser, in favor of an endorsee, who took it relying upon the endorsement.—*Ibid.* 12.

27. Is an endorsement, written on a note with a black lead pencil, instead of ink, a writing in law?

Yes, and gives the endorsee a right to recover upon the note in a court of law.—7 *D. & R.* 653. *S. C. 3 B. & C.* 234.

28. Does the endorsement of a note payable to bearer, make the endorser liable, as upon a new bill to bearer?

It does.

If the drawer or endorser of a bill pay under ignorance that notice was given, he may recover back the amount.—*Offat v. Vick, Walker*, 99.

The holder of a bill as collateral security for endorsing another, cannot recover on the collateral, if he pays the last without receiving notice.—*Bachelor v. Priest*, 12 *Pick.* 399.

The endorser of a note who takes it up, may sue a prior party without showing he himself had due notice.—*Ellsworth v. Brewer*, 11 *Pick.* 316.

29. Where a bill is drawn abroad, directed to the payee at S, requesting him to pay it in L, in which place must the demand be made?

It may be made at either.—*Chitty on Bills*, 92. *Mar.* 107.

30. Where the maker of a note has removed into another state, or another jurisdiction, subsequent to the making of the note, is a personal demand on him necessary to charge the endorser ?

It is not ; but it is sufficient to present the note at the former place of residence of the maker.—*McGruder v. Bank of Washington*, 9 *Wheaton*, 598. 2 *Condensed Rep.* 67.

31. Is it incumbent on the bearer of a bill of exchange, though a mere agent of the person entitled to it, to present it as soon as possible ?

It is ; because it is only by acceptance the person on whom the bill is drawn becomes debtor, and responsible to the holder, and if the affairs of the drawer should be deranged, an agent who has neglected to present the bill for acceptance, would be answerable in damages and interest to the person who employed him.—*Chitty on Bills*, 68. *Pothier*, 128. *Mar. pl.* 46.

32. Does an authority given to a partner to receive all debts owing to, and to pay those due from, a partnership on its dissolution, authorize him to endorse a bill of exchange in the name of the partnership ?

It does not, though drawn by him in the name of, and accepted by, a debtor of the partnership, after the dissolution.—1 *H. Bl.* 155. *Chitty on Bills*, 30.

OF DEMAND FOR PAYMENT.

1. What is the rule in the English law, respecting the demand for payment, where a note is made payable at a particular place ?

That the demand must be made at that place, because the place is made part and parcel of the contract.—3 *Kent*, 97. *Saunderson v. Judge*, 2 *H. Bl. Rep.* 509. *Sanderson v. Bowes*, 14 *East's Rep.* 500. *Dickinson v. Bowes*, 16 *East's Rep.* 110.

However, if the place appointed be deserted or shut up, it amounts to a refusal to pay, and a demand would be unavailable and useless.—*Howe v. Bowes*, 16 *East's Rep.* 112.

Or if the demand be made upon the maker elsewhere, and no objection be made at the time, it will be deemed a waiver of any future demand.—*Herring v. Sanger*, 3 *Johns. Cases*, 71.

If a note be made payable at a particular bank, demand on the maker is not necessary to charge the endorser. It is sufficient if the holder of the note be at the bank on the prescribed day, ready to receive payment, if the maker be not there ready to make it ; and by the endorsement of such a note, the endorser guaranties that on the day of payment the maker would be at the bank and pay the note, and that if he did not pay it there, he would be answerable for the amount, upon notice.—*Berkshire Bank v. Jones*, 6 *Mass. Rep.* 526. *Woodbridge v. Bingham*, 13 *Mass. Rep.* 556.

If a party has to pay a sum of money, a mere readiness to do so is not sufficient; he is bound to go to the party entitled to receive it, and pay or tender the money, in order to exonerate himself from liability.—*Co. Lit.* § 340. *Soward v. Palmer*, 2 *Moore*, 276. *Cranly v. Hillary*, 2 *Maule & Selw.* 122. And the acceptor of a bill, or maker of a note, is, in general, liable thereon, although the instrument has not been presented for payment, it being incumbent upon the acceptor or maker to discover the holder; and pay it without presentment.—*Chitty on Bills*, 47. *Turner v. Garden*, 4 *Barn. & Cress.* 1. 6 *Dowl. & Ry.* 5. *Ryan & Moody*, 215. *S. C.*

It is not necessary in an action against the maker of a note, promising to pay at a particular place, that the declaration should allege a demand at the time and place appointed for payment.—*Curley v. Vance*, 17 *Mass.* 389. The same general principle recognized in *Caldwell v. Cassidy*, 8 *Cowen*, 271. But where a note is payable at a particular place, it seems that a demand at such place should be made before suit.—*Caldwell v. Cassidy*, 8 *Cowen*, 271.

In an action against the endorser of a note or maker of a bill, demand of the acceptor of the bill, or maker of the note, must be averred in the declaration and proved at the trial.—*Bank of the United States v. Smith*, 11 *Wheat.* 171.

And if no demand is made of the maker, and sufficient excuse exists, that excuse, and not an averment of due presentment, should be stated in the declaration.—5 *Mass. Rep.* 170.

A demand of the maker of a note, by the cashier of a bank where it was deposited for collection, is sufficient to charge an endorser, though the cashier had not the note with him. All the parties residing in the town where the bank was.—*Gallagher v. Roberts*, 2 *Fairf.* 189.

Where a bill endorsed in blank by payee, but made payable to a particular person by the last endorsement, was presented to the drawee by the last endorser, who was *bona fide* in possession, held sufficient to charge the preceding endorser.—*Bachelor v. Priest*, 12 *Pick.* 399.

If the endorser of a note die before it becomes due, in an action against his executor by the holder, the declaration should allege the promise to pay, to be by the executor and not by the testator, or otherwise it will be a fatal variance.—*Stewart v. Eden*, 2 *Caines' Rep.* 121.

2. Does the stipulation to waive notice, waive the necessity of a demand?

It does not, unless the endorser has guarantied payment.—*Backus v. Shipard*, 11 *Wend.* 629.

A promise by the drawer of a bill, after due, to make a satisfactory arrangement, does not waive demand and notice, if he has no knowledge of the want of notice.—6 *Wend.* 658.

Nor will the mere fact of his including such claim in his list of creditors, under the insolvent laws.—*Ib.*

But where an endorser, on payment asked, said he was legally exonerated, but promised to pay, his promise binds without further proof of his knowledge.

The delivery of a check by one bank to the porter of another bank, on which it is drawn, and the return of the same as not good, with proof of such usage, is sufficient evidence of presentment.—*Merchants' Bank v. Spicer*, 6 *Wend.* 443.

A bank check need not be presented on the day it is received.—*Id.* A post-dated bank check is payable on demand, or after the day it bears date.—*Gough v. Staats*, 13 *Wend.* 549. *Mohawk Bank v. Broderick*, 10 *Wend.* 304.

When an injunction was served on a bank, half an hour after it was opened for business, the holder of a check received the day before, after bank hours, is not bound to show a presentment, to entitle him to recover on the original consideration, although it appeared the drawer had funds, and that the check would have been paid before the injunction.—*Lovett v. Cornwall*, 6 *Wend.* 369, *S. C.* 1 *Hall*, 56.

3. By whom must the demand for acceptance be made, previous to protesting a bill?

A notary public, to whom credit is given, because he is a public officer, and it cannot be made by his clerk.—*Chitty on Bills*, 91. 1 *T. R.* 175.

4. What if there be no notary?

Then, protest should be made by any substantial person in the place, in the presence of two or more witnesses, between sunrise and sunset. It should in general be made in the place where acceptance is refused; but where a bill is drawn abroad, directed to the drawee at Southampton, or any other place, requesting him to pay the payee in London, the protest for non-acceptance may be made either at Southampton or in London.

It is sufficient to note the protest on demand, and it may be drawn up in form at a future period.—3 *Kent*, 93.

The custom of merchants is stated to be that if the drawee of a bill of exchange absconds before the day when the bill is due, the holder may protest it, in case of refusal by the drawee to give security to pay it, to have better security for the payment of the remitter, and to give notice to the drawer of the absconding of the drawee.—*Chitty on Bills*, 128.

A bill drawn generally, but accepted payable at a particular place, must be demanded at that place, and not elsewhere.

5. In case of a bill or note payable at a particular place, is it necessary to aver and prove a demand at that place?

No. But where it is payable on demand at a particular place, it is then necessary that it should have been demanded at that place, before suit brought.—8 *Cowen*, 271.

The demand of payment of a bill or note must be made on what is called the third day of grace, which is the third day after it falls due.

The maker or acceptor is entitled to all the business part of the third day to make payment.

If the third day falls on Sunday, or any great holiday, as the fourth of July, the demand must be made on the day preceding.

6. When a bill is payable at so many days' sight, or from the date, is the day of presentment or date embraced or excluded ?

It is excluded ; thus, where a bill payable ten days after sight is presented on the first day of a month, the ten days expire on the eleventh ; where it is dated the first, and payable 20 days after date, these expire on the twenty-first.—*Lord Raym.* 281. *Stra.* 229.

The three days of grace apply equally to bills payable at sight.

A suit was instituted by the bank against Pearson, the drawer of a bill, endorsed by Hatch, which suit stood for trial at an approaching term. The attorney and agent of the bank agreed with Pearson, that the suit against him should be continued without judgment, until the term after that at which judgment would have been entered, if Pearson would permit a person in confinement under an execution at his suit, to attend a distant court as a witness for the bank, in a suit in which the bank was plaintiff. The witness was permitted to attend the court, and the suit against Pearson was continued, agreeably to the agreements. By the court : this was an agreement for a valuable consideration, and not a mere voluntary and discretionary exercise of authority on the part of the agent of the bank. It was a virtual discharge of the endorser of the bill.—*Bank of the United States v. Hatch*, 6 *Peters' Reports*, 250.

7. Is a presentment at a banking house after banking hours, a sufficient presentment to charge the drawer ?

It is not, and no inference is to be drawn from the circumstances of the bill being presented by a notary, that it had been duly presented within banking hours.—*Elford v. Leeds*, 1 *Maule & Sel.* 28. But though the presentment be out of banking hours, yet if a person be stationed at the banking house for the purpose of returning an answer, and he returns for answer, no orders, that is a sufficient presentment.—*Garnett v. Woodcock*, 6 *Maule & Sel.*

And presentment, at a house where the bill was made payable, not a banking house, at half-past seven, P. M., has been holden sufficient.—*Wilkins v. Zadis*, 1 *M. & Rob.* 41.

The implied contract of the drawer of a bill or endorser of a note is, to pay only in default of the drawer or maker ; and the holder must first demand payment of him, or use due diligence to demand it, before he can resort to the drawer or endorser.—*Monroe v. Easton*, 2 *Johns. Cas.* *Berry v. Robinson*, 9 *Johns. Rep.* 121. *May v. Coffin*, 4 *Mass. Rep.* 341. *Aubin v. Lazarus*, 2 *M'Cord*, 134. And if the endorser of a bill, on its becoming due, pays the amount to the endorsee, the latter never having demanded payment of the acceptor, he cannot recover the amount from the drawer.

It is sufficient evidence of a demand and refusal to pay a note payable at a particular place, if the note is left there, and no funds are provided to take it up.—*Nichols v. Goldsmith*, 7 *Wend.* 160.

When a note is payable at one of the several banks, and the holder places it there for discount or collection, with notice to maker, the holder is not bound to present it elsewhere.—13 *Pick.* 465.

8. Are the initials of the name of the holder of a bank check, endorsed on the check, sufficient to charge him as endorser ?

They are.—6 *Wend. Rep.* 443.

A check on a bank for the payment of money, to charge an endorser, must be presented with all dispatch and diligence consistent with the transaction of other commercial concerns ; and it was accordingly held, where a check was received in Schenectady, on the 14th January, drawn on a bank in Albany, a distance of sixteen miles from the former place, and between which places there is a daily mail, and not presented until the 6th February, that laches was imputable to the holder, and that the endorser was discharged.—*Mohawk Bank v. Broderick*, 10 *Wend. Rep.* 304.

It seems, had the check in this case been sent to Albany, on the 15th day of January, and presented on the next day, and notice given, the endorser would have been held liable.—*Ibid.*

9. When must a note payable on demand be presented for payment ?

It must be presented in a reasonable time, or it will be considered as out of time, and dishonored ; and if it be afterwards negotiated, it will in the hands of the endorsee be subject to all the equity which existed between the original parties.—*Furman v. Haskins*, 2 *Caines' R.* 369.

What is reasonable time is a question of law ; and a note payable on demand, negotiated 18 months after its date, was considered as being out of time.—*Ibid.*

OF PROTEST AND NOTICE.

1. By whom must a protest be made ?

By a notary public, if there be one in the place ; because, being a public officer, credit is given to his act. If there be no notary, the protest may be made by any substantial person in the place, in the presence of two substantial witnesses, between sunrise and sunset. It should in general be made in the place where acceptance is refused.

On a refusal to accept an inland bill, no protest is required.—*Chitty on Bills*, 93.

There does not appear to be any adjudication with respect to the time when a protest of a foreign bill must be made for non-acceptance, but from analogy with the time when a protest must be made for non-payment, it should seem that it should be made within the usual hours of business, on the day when acceptance is refused. It is said, however, that it is sufficient to note a bill for non-acceptance on the refusal, and that the protest may be drawn up any day after, by the notary, and be dated of the day upon which refusal was made.

The form of the protest must always be conformable to the customs of the country where it is made.—*Poth. pl.* 155. *Chitty on Bills*, 95

2. If acceptance or payment be refused, or the drawee of the bill, or maker of the note, has become insolvent or has absconded ; from whom and to whom must notice be given, and what must that notice state ?

Notice from the holder himself must be given to the preceding parties, *as to bills*, see 1 *Stra.* 441, 515. 2 *Black. Rep.* 747. 1 *Stra.* 469. 2 *Stra.* 1087. 1 *Term Rep.* 170, *as to Notes*.

3. What is a reasonable notice ?

Reasonable notice is usually compounded of law and fact, and is for the decision of the jury under the advice and direction of the court.

Notice to one of the several partners, or to one of several joint drawers or endorsers, is notice to them all.—1 *Camp.* 82.

In order to fix the endorsers, it is necessary to show a demand, at a proper time and place, or that due diligence has been used to get the money of the acceptor or maker, and that reasonable notice has been given to the drawer or endorsers.—1 *Camp.* 82. Before the parties to a bill are fixed by notice, any laches in the holder will discharge the endorsers : after notice no laches can be imputed, and no diligence required.—*M. Lomore v. Powell*, 6 *Pet.* 253.

It has been adjudged that payment of part, or a promise to pay the whole by the person insisting on the want of notice, amounts to a waiver of the consequence of the laches of the holder, and admits the right of the holder to resort to him.—*Bayl.* 71. *Chitty on Bills*, 102.

If, however, a promise to pay is made without a knowledge of the fact of non-acceptance, or according to a late case of the legal consequences of the holder not having given notice, it seems that it will not amount to a waiver ; and it has been determined that a drawer or endorser in such case, having actually paid the amount to the holder, may maintain an action for the recovery of it.—*Chitty on Bills*, 103.

4. What is the legal form of a notice ?

The law has not described any particular form ; all that is necessary is, that it should be sufficient to put the party upon inquiry, and prepare him to pay it or defend himself. If, therefore, there be some uncertainty in the description of the note in the notice, if it does not tend to mislead the party, it will be good.—*Reedy v. Seixas*, 2 *Johns. Cas.* 337.

So where a note was payable at a bank, and notice was given on the day when it became due, but in the notice the note was stated to be due three days before, and the name of the promissor was misstated ; it was held sufficient notice to charge the endorser, it being shown in evidence that he was not liable on any other note payable to the bank.—*Smith v. Whiting*, 12 *Mass. Rep.* 6.

5. Is it necessary that the notice of the dishonor of a bill should con-

tain a notification, that the holder looks to the party notified, for payment?

It is not.—*Cowles v. Harts*, 3 Com. Rep. 516.

A notice to an endorser was held sufficient, although it did not state at whose request it was given, nor who was the owner of the note.—*Mills v. Bank of the U. S.*, 11 Wheaton, 431.

Protest on inland bills is generally deemed unnecessary in this country, but the practice has been to have bills drawn in one state, on persons in another state, protested, and the statute of Kentucky seems to require it.—3 Kent, 94.

Going to the place of business of the maker of a promissory note, during business hours, to demand payment, and finding it shut, no person being left to answer any inquiries, is due diligence.—*Shield v. Ret*, 1 Pick., 401.

6. If there be no other evidence of the maker's residence than the date of the paper, what must the holder do?

He must make inquiry at the place of the date; and presumption is that the maker resides where the note is dated, and that he contemplated payment at that place.—*Stewart v. Eden*, 2 Cranch, 127. *Duncan v. McCullough*, 4 Serj. & Rawle, 480. 3 Kent, 96. But it is presumption only; and if the maker resides elsewhere within the state, when the note falls due, and that be known to the holder, demand must be made at the maker's place of residence.—*Anderson v. Drake*, 14 Johns. Reports, 114. 3 Kent, 96.

7. What constitutes a reasonable diligence in giving notice of protest?

It is a question usually compounded of law and of fact, and is for the decision of the jury under the advice and direction of the court.—1 Campb. 82. *Dodge v. Bank of Kentucky*, 2 Marshall, 616. *Noble v. Bank of Kentucky*, 3 Marshall, 264. The utmost possible dispatch need not be used. The reasonableness of the notice to an endorser of the non-payment of a promissory note, is a question of fact, to be submitted to the jury. No general rule can be laid down by the court.—*Gurley v. Gettysburg Bank*, 7 Serj. & Rawle, 324.

8. If a note be made for the accommodation of the endorser, and the money raised on it, by discount in the market, is received by him, is he entitled to notice of non-payment by the maker?

He is not.—*French v. Bank of Columbia*, 4 Cranch, 141.

But where the note has been made and discounted for the accommodation of the maker, the endorser is entitled to strict notice.—*Ibid.*

But where the drawee of a bill refused to accept or pay, notice need not be given to the endorser, if the bill was drawn and endorsed for the accommodation of the drawer, with the knowledge of the endorser, and

there being no expectation that the bill would be paid by the drawee.—*Farmer's Bank v. Vanmeter*, 4 *Rand.* 553.

9. On whom does the burthen of proof lie to prove that the drawer had no effects in the hands of the drawee, in order to excuse the want of notice?

It lies on the holder.—*Baxter v. Graves*, 2 *Marsh.* 152.

The bankruptcy or insolvency of the drawer or maker of a note, at the time when the note was made, or was payable, is no excuse for not giving notice of the non-payment to the endorser; even though the endorsement should have been for the mere accommodation of the drawer or maker.—*May v. Coffin*, 4 *Mass. Rep.* 341. *Farnum v. Fowle*, 12 *Mass. Rep.* 52. *Jackson v. Richards*, 2 *Caines' Rep.* 343. *Bank of America v. Narden*, 2 *Dallas' Rep.* 78. *Mallory v. Kirwin*, 2 *Dallas' Rep.* 192. *Ball v. Dennis*, 4 *Dallas' Rep.* 168. *Hussey v. Freeman*, 10 *Mass.* 84. *Contra, Buck v. Cotton*, 2 *Com. Rep.* 126.

In England it has been recently held, were a person lent his endorsement on a note to the drawer, who was bankrupt, payable on demand, for the purpose of enabling him to raise money on that security, by a deposit thereof with his banker, that a demand and notice thereof was necessary to charge the endorser, especially as in that case there had been a renewal of the credit, for a second term, without the knowledge of the endorser.—*Smith v. Becket*, 13 *East's Rep.* 189.

Where the drawee of a bill is a partner in the house on which it is drawn, it is not necessary for the holder to prove that notice of its dishonor was given to the drawer.—*Gowan v. Jackson*, 20 *Johns.* 176.

Where a demand cannot be made on the drawer, notice must nevertheless be given to the endorser, and that within as short a period after having ascertained that the demand could not be made, as if the demand had been made.—*Brice v. Young*, 1 *M'Cord*, 399. *Galpin v. Hard*, 3 *M'Cord*, 394. *Barker v. Barker*, 6 *Pick.* 80.

Where there are any funds of the drawer in the hands of the drawee, or if at the time the bill is drawn there are circumstances sufficient to induce a reasonable expectation that the bill will be accepted or paid, the drawer is entitled to notice of its dishonor, and to due diligence in the presentment of it.—*Robinson v. Ames*, 20 *Johns. Rep.* 146.

Where the drawer has a right to expect that his bill will be honored, as where there are running accounts between the drawer and drawee, he is entitled to notice, although, in point of fact, he had no funds in the hands of the drawee when the bill was drawn. The sound sense and justice of the exception is, that where a drawee knows he has no right to draw, and has the strongest reason to believe that the bill will not be paid, the motives for requiring notice of the dishonor do not exist, and his case comes within the reason of the exception.

Where a protested bill of exchange is held up for a long time, without notice of its non-payment and protest, the whole *onus probandi* is thrown upon the holder. He must prove every thing, and nothing is required of the drawer.

A bill of exchange was drawn in Virginia, in November, 1775, after the commencement of hostilities between Great Britain and her colonies, payable in England, which was duly protested for non-payment in June, 1776, after all intercourse between the two countries had ceased. Held that a state of war dispensed with the necessity of giving notice of the non-payment and protest to the drawer; but a notice of its dishonor should be given within a reasonable time after the impediment is removed.

A mistake as to the date of the note will not vitiate the notice, if in other respects it conveys to the party sufficient knowledge of the particular note dishonored.

Nor is it necessary that the notice should contain a formal statement that it was demanded at the place where payable. It is sufficient if it state the fact of non-payment; and it need not even state that the holder looks to the endorser for payment—that is implied by notice of non-payment.—*Bank of U. S. v. Carneal*, 2 *Peters*, 543.

Notice must be given by the first direct and regular conveyance, after the demand. Each party into whose hands a dishonored bill may pass, is allowed an entire day for the purpose of giving notice. Each party, on receiving notice, should immediately give notice to all the prior parties on the bill or note, in order to hold them. If the holder uses the ordinary mode of conveyance, he is required to see that the notice comes home to the party. Notice to one of several partners, or to several joint drawers, is notice to them all.—1 *Camp*, 82.

Where both the parties reside in the same town, the notice ought to be personally served or left at his dwelling-house or place of business, or both. The substance embraced in the notice is, to state the fact of demand and non-payment, and that the holder looks to the endorser.—*Id.*

It is not competent evidence of notice to show that it was the invariable and uniform practice of an agent's house to forward notices immediately on receipt, and the witness believed, from the course of their business, it was so done in the particular case.—*Flack v. Green*, 3 *Gill*. & *John*, 474.

When sent by mail, if there be *prima facie* evidence of due diligence, and no proof that it was sent to a wrong place, it is enough.—*Wells v. Whitehead*, 15 *Wendell*, 572.

10. Is it necessary that notice of protest should be sent to the office nearest the endorser?

It is not. It is sufficient if sent to the office to which he usually resorts for his letters.—4 *Wendell*, 328.

A mistake in the name of the office to which the notice is sent, is of no consequence, if it is as well known under that as under the true name.—*Bank of Geneva, v. Hewlett*, 4 *Wend.* 328.

If the residence of the endorser be known, and he has given directions where to send notice, any deviation therefrom will be at the risk of the holder.—*Paterson Bank v. Butler*, 7 *Halstead*, 268.

Notice left at a boarding-house, by the notary, with a fellow-boarder, is sufficient.—*Bank of U. S. v. Hatch*, 6 *Peters*, 250.

Notice sent by mail to Dashville, New Jersey, when the true residence is Dashville, New-York, known to the principal, but not to the notary who gave notice, is bad.—*Paterson Bank v. Butler*, 7 *Halst.* 268.

A notice left by a notary's clerk with a person whom he did not know, but who informed him that he was the brother of the endorser, and would give it to him as soon as it could be sent by mail, is not sufficient.—*Ibid.*

11. To charge the endorser of a note held by a bank, must the presentment and notice be conformable to the usage of the bank ?

It must. Thus, it is the usage of the Bank of Boston to send notice to the maker, on the last day, exclusive of the days of grace, and on the last day of grace, after banking hours, to send notice to makers and endorsers of notes unpaid. This bank holding a note, had sent the first notice to the maker in the usual manner, and on the last day of grace, before banking hours, sent another notice by mail to the maker, and immediately, and before banking hours, notified the endorser. Held not sufficient.—*Bank of Boston v. Hodges*, 9 *Pick.* 420.

Where drawee is unable to accept, and so notifies drawer, who authorizes to redraw, which he does, and the drawer refuses to accept, this does not excuse neglect to give notice of the dishonor of the first bill.—*Brown v. Ferguson*, 4 *Leight*, 37.

Each party must use due diligence, the over diligence of the one will not supply the under diligence of the other, although the defendant receives notice as early as he regularly could.—*Ibid.*

When notice is averred to have been actually given of the dishonor of a bill, it must be proved as laid. And, therefore, if in fact it has not been given, the declaration should state that due diligence had been used to give notice, and assign the reason why it was not done.—*Blakely v. Grant*, 6 *Mass. Rep.* 386. But see *Stewart v. Eden*, 2 *Caines' Rep.* 121. *Price v. Young*, 1 *M'Cord*, 339. *Williams v. Bank of the United States*, 2 *Peters'*, 96.

When the declaration contains an averment of due notice of the dishonor of the bill, legal notice must be proved. Evidence that the holder had used due diligence to give notice without effect, will not sustain the declaration.—*Hill v. Varll*, 3 *Greenl.* 233. And if no demand has been made of the maker, and a sufficient excuse exists, that excuse and not an averment of due presentment should be stated in the declaration.—*Bond v. Farham*, 5 *Mass. Rep.* 170.

It is not necessary to set forth in the declaration a presentment or protest for non-payment of a bill where there is an averment of a previous presentment for acceptance, and refusal, and due notice thereof given; and if averred, it will be rejected as surplusage.—*Mason v. Franklin*, 3 *Johns. Rep.* 202.

Where the endorsee of a bill, in an action against the endorser, relies on the want of funds of the drawer, in the hands of the drawee, instead

of due notice, it is necessary for him to state that fact in the declaration.—*Frazier v. Harris*, 2 *Litt.* 185.

12. May notice be proved by the book of a messenger of a bank, whose duty it is to give notice, who has absconded from the country?

It may.—*North Bank v. Abbott*, *Pick.* 465.

13. Where a note is transmitted to an agent for collection, by the holder, and presented and dishonored, is notice sent to the principal, and by him given to the endorser, sufficient?

It is, although it does not reach him so soon as if sent directly by the agent.—*Church v. Barlow*, 9 *Pick.* 549.

14. Is an endorser who takes an assignment of all the estate of the maker, to meet his responsibility, before the note is due, entitled to demand notice?

He is not.—*Mechanics' Bank v. Griswold*, 7 *Wend.* 165. *But see Watkins v. Crouch*, 5 *Leigh*, 522.

Where a promissory note drawn to the order of the plaintiff, was endorsed by defendant as a security to plaintiff for a loan to the drawee, plaintiff may write a guaranty over defendant's name; and notice of non-payment is not necessary, if defendant was acquainted with the fact of maker's insolvency, at the time the note fell due.—*Leech v. Hill*, 4 *Watts*, 448.

On a note that fell due on Saturday, protested, the notary on Monday inquired of a subsequent endorser, where the first endorser lived, and the former went to another party to inquire, and ascertaining that it was in Philadelphia, on Tuesday the notice was put into the post-office, and held in time.—*Smith v. Hawthorn*, 3 *Rawle*, 355.

A bill of exchange was endorsed by C, at New Orleans, payable in Boston and owned in New-York, was dishonored by non-acceptance, on the 11th of August. The Boston agent of the holder wrote by the same day's mail, informing him of the dishonor; and on the 13th the holder requested his agent to give notice, which he did by letter to C, mailed at Boston on the 19th. Held, that it was too late, even if the agent was authorized to send to his principal at New-York.—*Talbot v. Clark*, 8 *Pick.* 186.

15. Is the rule as to notice as strict in the case of guaranties as that of negotiable paper?

It is not, and the neglect to give notice must have produced some loss or prejudice to the guarantor.—*Oxford Bank v. Haynes*, 8 *Pick.* 423. 3 *Kent*, 124.

By the general principles of law, guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt.

In the case of *Douglas v. Reynolds*, 7 *Peters*, 113, which involved a continuing guaranty, it was held that a demand upon the principal debtor.

and a failure on his part to perform his engagement, are indispensable to constitute a *casus fœderis*. The creditors are not bound to institute legal proceedings against the debtor, but they are bound to use reasonable diligence to make demand, and to give notice of non-payment. But as appears by the case of *Breed v. Hillhouse*, 7 *Connecticut Reports*, 523, when there is an absolute guaranty of the payment of a note, no demand or notice is requisite to fix the guarantor. See also *Reed v. Cutts*, 7 *Greenlf.* 186, which holds the same doctrine.

The government of the United States, when it becomes the holder of a bill, is bound to use the same diligence as a private individual.—*U. S. Bank v. Barker*, 12 *Wheaton*, 559.

The subject of notice of the dishonor of bills of exchange, is discussed in the following cases.—*Bank of Washington v. Triplet*, 4 *Leigh*, 25. *Williams v. Bank U. S.*, *id.* 604. 2 *Peters*, 96. *Bank U. S. v. Corcoran*, *id.* 121. *Bank U. S. v. Carneal*, *id.* 543. *Bank U. S. v. Smith*, 11 *Wheaton*, 171. *Mills v. Bank U. S.* *id.* 431. *Bank U. S. v. Barker*, 12 *Wheaton*, 559. *Mead v. Engs*, 5 *Cowan*, 303. *Morgan v. Woodworth*, 3 *Johns. Cas.* 89. *Staunton v. Blossom*, 14 *Mass. Rep.* 116. *Johnson v. Harth*, 1 *Bailey's S. C. Rep.* 482. *Rogers v. Stephens*, 2 *Term Rep.* 713. *Corney v. Dacosta*, 1 *Esq. N. P. Rep.* 302. *Clegg v. Cotton* 3 *Boss. & Pull.* 239. *Boss. & Pull.* 240. *Brown v. Maffey*, 15 *East's Rep.* 216. *Rucker v. Hiller*, 16 *id.* 43. *Cory v. Scott*, 3 *Barn. & Adol.* 619. *French v. Bank of Columbia*, 4 *Cranch*, 141. *Hill v. Martin*, 12 *Martin's Louis. Rep.* 177. 4 *Barn. & Cress.* 517. *Cromwell & Wing v. Lovett*, 1 *Hall's N. Y. Rep.* 56. *Nolte v. His Creditors*, 19 *Martin's Louis. Rep.* 9.

16. Is the holder of a check bound to give notice of his dishonor to the drawer, for the purpose of charging the person from whom he received it ?

He is—and it is sufficient, if he presents it with due diligence to the banker on whom it is drawn, and gives due notice of its dishonor to those only against whom he seeks his remedy. As between drawer and holder, a presentment at any time before suit brought is sufficient, unless he can show injury, *contra* as to endorser.—*Elting v. Brinkerhoff*, 2 *Hall*, 459. *Gough v. Staats*, 13 *Wend. Rep.* 549.

INCIDENTS OF BILLS, NOTES, ORDERS, &c.

1. Does a promissory note, in its original form of promise from one man to pay a sum of money to another, bear any resemblance to a bill of exchange ?

It does not, until it is endorsed ; then the resemblance begins ; for then it is an order by the endorser to the maker of the note, who by his promise is his debtor, to pay the money to the endorsee. The endorser of the note corresponds to the drawer of the bill ; the maker to the drawer or acceptor, and the endorsee to the payee. When this point of resem-

blance is once fixed the law is fully settled to be exactly the same in bills of exchange and promissory notes, and whenever the law is reported to have been settled with respect to the acceptor of a bill, it is to be considered as applicable to the maker of a note; when with respect to the drawer of a bill, then to the first endorser of a note; the subsequent endorsers and endorsees bear an exact resemblance to one another.—2 *Burr.* 676.

2. Is a promissory note an absolute extinguishment of a simple contract debt?

It is not, but only *sub modo*, and, therefore, cannot be pleaded in answer to a declaration upon a simple contract. It is but evidence under the general issue, which may be answered and rebutted by producing and cancelling the note at the trial.—*Hughes v. Wheeler*, 8 *Cowen*, 77. *Glenn v. Smith*, 2 *Gill. & Johns.* 493. Therefore a plea to the common counts *in assumpsit*, that the parties had accounted together, and the defendant had given to the plaintiff his promissory note, for the plaintiff's demand, payable to the plaintiff or order, which was accepted on account of his demand, is bad in substance.—8 *Cowen*, 77. And per Sutherland, J., the giving and receiving of a negotiable note, for goods sold without any agreement, is no extinguishment of the original cause of action.—*Bill v. Porter*, 9 *Com. Rep.* 23. *Lilmore v. Bossey*, 3 *Fairf.* 488.

An express agreement by a creditor, to take a bill or note for the full amount of his debt, as an absolute and unconditional extinguishment thereof, destroys the right of action as for such debt, and leaves the creditor without remedy, except upon the instrument.—*Brown v. Kewby*, 2 *Boss. & Pull.* 518. *Exp. Blackburn*, 10 *Ves.* 206. *Carnegie v. Allenby*, 6 *Barn. & Cres.* 381. 9 *Dowl. & Ry.* 391. *Tempest v. Ord*, 1 *Maddox*, 89.

It is held in the courts in the U. S. that the giving a negotiable promissory note, is not payment, unless it is expressly so agreed.—*Booth v. Smith*, 3 *Wend.* 66. *Putnam v. Lewis*, 8 *Johns.* 389. *N. Y. St. Bank v. Fletcher*, 5 *Wend.* 85. *Johnson v. Weed*, 9 *Johns.* 310. *Bill v. Porter*, 9 *Com.* 23. *Elliot v. Sleeper*, 2 *N. Hamp.* 525. *Keane v. Dufresne*, 3 *Serj. & Rawl.* 233. This is also the doctrine of the civil law. *Pot. on Oblig.* pt. 3, c. 2, art. 4. 1 *Domat*, liv. 4, tit. 3, § 1. So of the Scotch law.—*Thompson on Bills*, 192.

In Massachusetts the decisions on this subject seem not to have been wholly uniform. Sometimes the giving a negotiable note is held an absolute payment, like cash. *Whitcomb v. Williams*, 4 *Pick.* 228. Sometimes it is held only *prima facie* evidence of payment, and liable to be rebutted by circumstances showing a different intention.—*Reed v. Upton*, 4 *Pick.* 525.

3. May there not be a recovery against the acceptor on a bill of exchange, endorsed to the plaintiff, and lost or mislaid?

There may; and the existence of the bill being once established,

the plaintiff may prove the loss of it by his own oath.—*Meeker et al. v. Jackson*, 3 *Yeat. Rep.* 443.

See as to the evidences in the case of lost notes.—*Peabody v. Denton*, 2 *Gallis' Rep.* 351.

Where a bank note has been divided for transmission, and one of the parts is lost, the holder may recover on presenting the other part, as the parts of a divided bill are not separately negotiable.—*Patton v. Bank S. Carolina*, 2 *North & M'Cord*, 464.

A note not negotiable is no bar to an action on the account for which it was given.—*Trustees v. Kendrick*, 3 *Fairf.* 381.

The acceptance of a note for a precedent debt, suspends the remedy on it until the note reaches maturity.—*Glenn v. Smith*, 2 *Gill. & J.* 493. *O'Kie v. Spencer*, 2 *Whart.* 253.

A note taken by express agreement, in payment of a judgment, extinguishes the precedent debt.—*N. Y. State Bank v. Fletcher*, 5 *Wend.* 85.

When a creditor takes his debtor's draft on a third person, and receives from the latter notes payable in six or nine months, he discharges the debtor.—*Southwick v. Sax*, 9 *Wend.* 122.

The holder of a bill, who takes it for a precedent debt, stands in the shoes of drawer.—*Ontario Bank v. Worthington*, 12 *Wend.* 593.

In Maine, the legal presumption is, that a negotiable instrument, accepted for a precedent debt, is an extinguishment, but it may be rebutted.—*Descasillas v. Harris*, 8 *Greenleaf*, 298.

But not so if made abroad, unless made by the laws of such country.—*Ibid.*

4. Is it a good plea to an action for the recovery of a simple contract debt, that the plaintiff has taken for, and on account of it, a bill of exchange or promissory note, made or endorsed by the debtor, for the same amount, payable to the creditor himself, or at his instance to a third person?

It is.—*Kerslake v. Morgan*, 5 *T. R.* 513. *Stedman v. Gooch*, 1 *Esp. R.* 3. *Rex v. Dawson*, *Wight*, 32. *Chitty on Contracts*, 594.

This defence is not founded on the notion that the bill or note operates as an absolute payment or extinguishment of the original debt, or changes its nature, or amounts to accord and satisfaction; for the right to sue upon the original demand, without declaring upon the bill or note, revives on the dishonor of the instrument.—*Buckford v. Maxwell*, 6 *T. R.* 52. *Owenson v. Morse*, 7 *T. R.* 64.

The defendant having given the plaintiff, in payment for goods, certain bills of exchange, which were afterwards dishonored, the latter sued him for the price of the goods. Held, that the plaintiff was not bound to produce the bills at the trial, and that the fact of their being in the possession of his agent at the time, did not bar his right of recovery.—*Hadwin v. Mendizabel*, 10 *Moore*, 477. *S. C. 2 C. & P.* 20.

If the bills had gone from the plaintiff's control, he could recover, but if, on payment, they are not forthcoming, he may have relief in equity.

The reason that the instrument is, during its currency, a bar to an action for the debt is, that the entering into a new engagement and security by becoming a party to an instrument which subjects the debtor to peculiar liabilities, or affords the creditor fresh and peculiar rights, constitutes a

new and good consideration for giving credit. During the currency of the security, the original remedy is therefore suspended, or in abeyance. There being a new consideration, the case does not fall within the rule, that a mere gratuitous promise to give time for payment of a debt previously incurred is not binding.

5. If a negotiable note be made payable to two executors, as such, can it be transferred by the endorsement of one of them ?

It cannot. But both must endorse the note to pass the property by assignment.—*Smith v. Whiting*, 4 Mass. Rep. 334.

6. Are the three days of grace on a note or bill allowed in Massachusetts ?

They are not, unless expressly stipulated in the contract.—*Jones v. Fales*, 4 Mass. Rep. 245.

Not allowed on common notes of hand in Ohio. *Contra* as to those payable at banks.—*Sharp v. Ward*, 7 Ohio, 223. See also *Harvell v. Bixler*, *Walker*, 176.

A note not negotiable is not entitled to grace.—*Backus v. Dunforth*, 10 Conn. 300.

Three days, are exclusive of the day on which the bill becomes due, every where except at Hamburg, where that day makes one of the days of grace.—*Chitty*, 140.

In France, the days of grace are abolished by the new commercial code, and all bills and notes are payable at the time mentioned in the bill.—*Code de Commerce*, Liv. 1 Tit. 10. *Des Lettres de Change*.

7. Is a bill or note confined to any set form of words ?

It is not ; a promise to *deliver*, or to be *accountable*, or to be *responsible* for so much money, is a good bill or note, but it must be exclusively and absolutely for the payment of money.—*Morris v. Lee*, 2 Ld. Raym. 1396. 8 Mod. Rep. 362. Str. 629. *Martin v. Chauntry*, Str. 1271. *Thomas v. Roosa*, 7 Johns. Rep. 461.

In England, negotiable paper must be for the payment of money in specie, and not in bank notes.—*Bayley on Bills*, Edit. Boston, 1826, p. 6.

In this country, it has been held, that a note payable in bank bills was a good negotiable note within the statute, if confined to a species of paper universally current as cash.—*Keith v. Jones*, 9 Johns. Rep. 120. *Judah v. Harris*, 19 Ibid. 144.

But the doctrine of these cases has been met and denied.—*M' Cormack v. Trottes*, 10 Serj. & Rawle, 94.

And it seems, that the weight of argument is against them, and in favor of the English rule. It is essential that the bill carry with it a personal credit given to the drawer or endorser. And that it be not confined to credit upon any future or contingent event or fund.—3 Kent, 75.

The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the

instrument.—*Dawkes v. De Lorane*, 3 Wils. Rep. 207. *Beardesley v. Baldwin*, 2 Str. Rep. 1151. *Roberts v. Peake*, 1 Burr. 323.

8. If the bill be drawn payable six weeks after the death of the maker's father, is it a good bill?

It is, and it is of no consequence how long the payment is to be postponed.—3 Kent, 76. *Cook v. Colehan*, Str. Rep. 1217.

It is even held, that a note payable within two months after such a ship is paid off, is a good negotiable note, as the event is morally certain.—*Andrews v. Franklin*, Str. Rep. 24.

But I should think, such a reference was not sufficiently certain, and that the case might well have been questioned, if it had not been subsequently confirmed in 1 Wils. Rep. 262. 3 Kent, 213.

The numerous English and American cases all going to the support of this one general proposition, that the money mentioned in the instrument must be payable absolutely, and at all events, and not made to depend on any uncertainty or contingency, are diligently and accurately collected in *Bayley on Bills*, Edit. Boston, 1826, p. 8—15, and *Chitty on Bills*, Edit. Philadelphia, 1826, p. 42—50.

An order drawn by a debtor on a person holding funds of such debtor in his hands is, after exhibition to the drawee by the holder, an assignment of such funds to the extent of the order, and the drawee cannot afterwards legally part with such funds to the drawer or any other person.—1 Caines' Report, 379.

9. What are the respective advantages and disadvantages of the action of debt over that of *assumpsit*?

The principal advantages arising from adopting this action are, first, that the plaintiff need not execute a writ of inquiry after a judgment by default; and secondly, that the defendant must, in all cases where the action is founded on a special contract, as in the case of a bill of exchange, put in special bail on bringing a writ of error.—*Chitty on Bills*, 219.

The entry of a check in the private bank book of the holder, as cash, is equivalent to payment; and if the check is a forgery, of which the holder was ignorant, the bank must support the loss. It seems that the acceptor of a forged bill is bound to pay it, not upon the presumption that his acceptance has given a credit to the bill, but because it is his duty to know the drawer's handwriting, which he is precluded from disputing. If a forged check is credited as cash in the holder's bank book, and afterwards, upon being informed of the forgery, and under a mistake of his rights, he agrees that if the check is really a forgery it is no deposit; he is not bound by the agreement.—1 Bin. 27. *Levy v. W. S. B.*

A bill was endorsed by the payee in these words, "pay to S W, or to his order, for my use." Defendants discounted it for S W, and applied the money to his use instead of the endorsers. S W became a bankrupt. Defendants were held liable to the payee, for the amount of the bill, this being a restrictive endorsement.—*Sigourney v. Loyd*, 8 B. & C. 622. *Affirmed in Cam. Sac.* 5 Bing. 525.

10. Is the acceptor who pays under a forged endorsement, by a person who had found a lost bill, liable to the real payee?

He is.—3 *T. R.* 127.

If a bill payable to A or order, get into the hands of another person of the same name as the payee, and such person knowing he is not the real person in whose favor it is drawn, endorse it, of what is he guilty?

He is guilty of forgery.—4 *T. R.* 28.

11. If the drawer of a bill of exchange at the time of drawing, has a right to expect that his bill will be honored, although he has no funds in the hands of the drawer, is he entitled to strict notice of non-acceptance or non-payment?

He is.—4 *Cranch*, 141. 2d *Cond. Sup. Court Rep.* 58. *French's Ex. v. Bank of Columbus.*

12. Is a bill drawn in Ireland, on England, an inland or foreign bill?

It is a foreign bill.—*Mahoney v. Ashlin*, 2 *Barn. & Adol.* 480. And a bill drawn in Scotland on England, is a foreign bill.—1 *Bell's Com.* 330, (4th Edition.) And see 1 *Barn. & Cres.* 192. 1 *Moo. and Malk.* 66. And the universal consent of merchants has long since established a system of customs, relative to foreign bills, which is adopted as a part of the law in every commercial state.

In an action by the endorsee of a foreign bill of exchange, the endorser the defendant, is liable for damages according to the law of the place where the bill was endorsed.—*Slocum v. Pomeroy*, 6 *Cranch*, 221.

A mere agreement by the holder of a bill with the drawer, for delay, without any consideration for it, and without any communication with, or assent of the endorser, will not discharge the latter, after he has been once fixed in his responsibility to the drawee and due notice to himself.—12 *Wheat.* 554.

A bill payable so many days after sight, means after so many days legal sight. It is not merely having seen the bill or known of its existence that constitutes a presentment to the drawee; in legal contemplation it must be presented to him for acceptance, and the time of the bill begins to run not from the mere presentment, but from the presentment and acceptance.—1 *Mason*, 176. *Mitchell v. Degrand.*

A bill drawn five days after sight and accepted on the first of the month is due on the ninth day of the same month; the day of acceptance being excluded, and the three days' grace allowed.—1 *Mason*, 176.

The holder of a bill of exchange is entitled to recover at the rate of exchange at the time that notice of the protest is given; this is the settled law in New-York.—1 *Paine*, 156.

A being indebted to B living beyond seas, sends him a bill of exchange drawn in his favor and by him endorsed, pay to B or order, for my use, to be applied when paid in discharge of the debt. B may sue the

drawer or endorser on the bill if protested, but cannot recover damages against the endorser.—1 *Washington C. C. R.* 512.

In an action by the payee and endorser of a bill against the acceptor, the plaintiff cannot recover the amount of damages and costs, which have been recovered against him by his endorsee, without a money count in the declaration.—1 *Peters' C. C. R.* 350.

An action in favor of an endorsee of a promissory note, by a citizen of one state against the endorser, a citizen of another state, may be brought in the circuit court of the U. S., though the maker and payee of such note are citizens of the same state.—3 *Day*, 3.

Though a note be void against the maker, it may be good against an endorser, in favor of an endorsee, who took it relying on the endorsement.—*Id.* 12.

The contract made by endorsement extends to all subsequent endorsements, even though the note was not originally negotiable.—*Id.* 12.

13. Is not the payee of a note who has endorsed it with a saving of his own liability, a competent witness to prove an alteration of the note since its execution?

He is.—*Parker v. Hanson*, 7 *Mass. Rep.* 470.

So a drawer is a competent witness to prove, that at the time of drawing the bill he communicated certain conditions and restrictions as to his right to draw the bill.—*Storer v. Logan*, 9 *Mass. Rep.* 55.

An endorser is a competent witness in an action by an endorsee, against the maker, to prove that the note was, after the endorsement, fraudulently put into circulation.—*Woodhull v. Holmes*, 10 *Johns. Rep.* 231. See also *Owen v. Mann*, 1 *Day's Rep.* 333, *note*.

14. Is not an order in substance a bill of exchange?

It is; and the drawer is only liable upon the exercise of due and proper diligence by the holder.—*Hunter v. Simral*, 58 *Litt.* 16.

15. If a note is drawn and payable in one place, and sued in another, how is the interest to be regulated?

It is to be regulated according to the place upon which it was drawn.—*Foden v. Sharp*, 4 *Johns. Rep.* 183. *Slocum v. Pomeroy*, 6 *Cranch's Rep.* 221.

16. Are the acceptors of a bill and the maker of a note, liable to an endorser for the costs which he may have incurred in consequence of default of payment by them?

They are not.—*Steele v. Sawyer*, 7 *M'Cord*, 459.

So also, the acceptor of a bill, with funds, who has failed to pay, is not liable for the costs of a suit, against the drawer.—*Barnwell v. Mitchell*, 3 *Conn. Rep.* 101.

17. How are endorsers, on accommodation paper, for the benefit of a

third person, where there is no special agreement between such endorsers, and where neither is benefited, to be considered ?

They are to be considered co-sureties. Therefore, where A and B became, at several times, endorsers on a note made for the benefit of C ; on which C, by discounting at a bank, received the money ; it was held that B, against whom the Bank recovered, and who was the last endorser, was entitled to call upon A for one-half only of the sum recovered by the bank ; and that every endorsement is but *prima facie* evidence of the purchase of a note, and the contrary may be shown.—*Daniel v. M' Rae*, 2 *Hawke*, 590.

17. If the endorsee, after taking the maker in execution, take from him a bond or warrant of attorney to confess judgment, in satisfaction of the execution, does this discharge the other parties ?

It does.—*M'Fadden v. Parker*, 4 *Dall. Rep.* 275.

18. Is not a note made without consideration a *nude pact*, and void as between the original parties to it ?

It is.—*Pearson v. Pearson*, 7 *Johns. Rep.* 26. *Stockpole v. Arnold*, 11 *Mass. Rep.* 27.

So if the consideration have totally failed.—*Dennison v. Bacon*, 10 *Johns. Rep.* 190. *Tappan v. Van Wagenen*, 3 *Johns. Rep.* 465. *Fowler v. Shearer*, 7 *Mass. Rep.* 14. *Livingston v. Hastie*, 2 *Caines' Rep.* 247. *Bark Hampstead v. Case*, 5 *Conn. Rep.* 528. See *Hills v. Banister*, 8 *Cowen*, 31.

19. Is the endorser of a note liable for fees of protest ?

He is.—*Menitt v. Benton*, 10 *Wend.* 118.

20. Where the cashier of a bank, on a note held by the bank becoming due, takes a check of a third person, and a new note for the balance, and delivers up the old note, on his honor of the check, will an action lie on the original note for the amount of the check ?

It will.—*Olcott v. Rathbone*, 5 *Wend.* 490.

A check on a bank, given in the ordinary course of business, is not presumed to be received in absolute payment, although the drawer had funds, and that the check would have been paid before the injunction.—*Lovett v. Cornwall*, 6 *Wend.* 369, *S. C.* 1 *Hall*, 56.

21. What if a person sign a note "as a guardian?"

He will be held personally liable to payment.—*Thatcher v. Dismore*, 5 *Mass. Rep.* 299. *Foster v. Fuller*, 6 *Mass. Rep.* 58.

22. If two persons endorse a note in virtue of a mutual understanding with each other, to lend their names for the accommodation of the maker,

may not evidence be left to the jury of such mutual understanding or agreement?

It may.—*Love v. Wall*, 1 *Hawkes*, 313.

One joint endorser who has paid the whole amount of a note negotiated at bank, cannot recover from another joint endorser his contribution without proving the insolvency of the drawer.—*Pearson v. Duckham*, 3 *Litt.* 386.

23. Have not the courts of equity always given effect to and protected the assignment of choses in action?

They have; and the courts of law now take the same notice of such assignments, and apply to them, as far as consistent with legal principles and rules of practice, the doctrine established in courts of equity.

Thus, where a chose in action is assigned by the owner, he cannot interfere to defeat the rights of the assignee in the prosecution of a suit brought to enforce the rights.—*Welch v. Mandeville*, 1 *Wheaton's Rep.* 235. *Mandeville v. Welch*, 5 *Wheaton's Rep.* 277, 283.

The incapacity of one party to a bill does not affect the responsibility of the others, as, that the drawee was postmaster general.—*Knox v. Reeside*, 1 *Miles*, 294.

24. How is a release procured by the original debtor after notice of the assignment considered?

It is considered as a nullity.—*Johnson v. Bloodgood*, 1 *Johns. Cas.* 51. *Wardell v. Eden*, 2 *Johns. Cas.* 121. *Vanvechten v. Graves*, 4 *Johns. Rep.* 403. *Littlefield v. Storey*, 3 *Johns. Rep.* 425. *Andrews v. Beecher*, 1 *Johns. Cas.* 411. And where the assignor of a judgment enter up satisfaction on the record, after notice to the defendant of the assignment, the court will order the entry of the satisfaction to be vacated.—*Wardell v. Eden*, 2 *Johns. Cas.* 121, 258, *S. C.* 1 *Johns. Rep.* 531, *note*, *S. C. Coleman's Cas.* 137.

Nor can the suit be discontinued or withdrawn by the nominal plaintiff without the consent of the assignee for whose benefit the suit is brought.—*Welch v. Mandeville*, 1 *Wheat. Rep.* 235. *M'Cullen v. Coxe*, 1 *Dall. Rep.* 130.

But these doctrines apply only to the case of a total, and not to a partial assignment of the choses in action.—*Mandeville v. Welch*, 5 *Wheat. Rep.* 277, 283.

25. Does a guaranty, in general terms warranting the collection of a note, authorize a suit against the guarantor, by any subsequent holder of the note?

It does not. It is a special contract which can be enforced only in the name of the person with whom the contract was made.—*Lamourieux v. Hewitt*, 5 *Wend.* 307.

26. What is the duty of the assignee of a note not negotiable, who

takes himself to pursue the maker in the first instance, or of one holding a note in trust?

It is to demand payment, as in case of an endorsee, and if the note is not paid, forthwith to attach estate of the debtor, if to be found, and if not, to attach his body, unless the maker absconds, leaving no effects, or becomes bankrupt.—*Whittlesey v. Dean*, 2 *Atkins' Rep.* 263.

27. What is the holder of a foreign bill of exchange, returned protested, entitled to recover in this country by the laws and usages of different states?

It is different in different states. In New-York he is entitled to recover the contents of the bill, at the rate of exchange, or price of bills, on the place on which it was drawn, at the time of the return of the dishonored bill, and notice thereof to the drawer, together with twenty per cent. damages.—*Graves v. Dash*, 12 *Johns. Rep.* 17.

Much useful information on this subject is contained in *Wheaton's Selwyn*, vol. 1, page 378, note (v.)

28. May the holder of a negotiable note, by blank endorsement, maintain a suit on it without filling up the same to himself?

He may.—*Grifforn v. Jacobs*, 2 *Miller's Louisiana Rep.* 192.

The holder of a promissory note payable to order, and endorsed in blank by the payee, is entitled to recover on it, it being in the nature of a note payable to bearer.—*Walsh v. Wells*, 7 *Louisiana Rep.* 337.

29. Is cutting off a memorandum, regulating the payment of a note, such a material alteration as avoids it?

It is; and no suit lies for the original consideration.—*Wheelock v. Freeman*, 13 *Pick.* 165. The alteration of a note, not before witnesses, by a person not present at the signing, is a material alteration and avoids it.—*Bracket v. Moresior*, 2 *Fairf.* 115. Where A & B made a note payable to H for twenty dollars, and B, who received it to pass to H, alters it before delivery to one hundred and twenty dollars, A is not liable.—*Goodman v. Eastman*, 4 *N. H.* 455.

But where a note intended to be made for eight hundred dollars and is endorsed by payee for accommodation of maker, and delivered to him, and by mistake is written eight—omitting the words hundred dollars, and the maker insert the same, the endorser is liable to a holder to whom it was delivered as security for his debt.—*Boyd v. Brotherson*, 10 *Wend.* 93.

The adding of a date to an endorsement of a partial payment on the back is not a material alteration.

How far alterations of a note or bill are material, see *Martendale v. Follet*, *Adams*, 95. *Bank of the United States v. Russel*, 3 *Yeates*, 391. *Stephens v. Graham*, 7 *S. & R.* 508. *Stout v. Cloud*, 5 *Little*, 204. *Bank of Limestone v. Pennick*, 5 *Monroe*, 25. *Homer v. Wallis*, 11 *Mass.* 309. *Cumberland Bank v. Hall*, *Halstead*, 215.

Every alteration of a note by the maker, in respect to the place of

payment, or any alteration of the contract of the endorser, in any part, which may, in any event, become material without the approbation of the endorser, discharges his liability.—*Woodward v. Bank of America*, 19 J. R. 391.

30. Will an agreement by the president and cashier of a bank that the endorser of a promissory note shall not be liable on his endorsement, bind the bank ?

It will not. All discounts are made under the authority of the directors, and it is for them to fix any condition which may be proper in loaning money.—*Bank of the United States v. Dunn*, 6 Peters' Rep. 51.

A bank which by law is limited to six per cent. interest on all discounts, is entitled to recover at the rate of seven per cent. per annum, from the time that the debt becomes due.—*U. S. Bank v. Chapin*, 9 Wend. Rep. 471.

31. May not negotiable paper be transferred by a factor or other person, fraudulently, so as to bind the true owner as against the holder ?

It may, if taken in the usual course of trade, for a fair and valuable consideration, without notice of the fraud ; or in payment of an antecedent and existing debt ; or for cash or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes ; but not for contingent engagements previously made for the agent, who at the time of transfer is notoriously insolvent, and on which the assignee had not then become chargeable.—*Bay v. Coddington*, 5 John. Ch. 54.

32. Will the courts of law sanction any kind of artifice or contrivance by which the lenders of money may hope to evade the statutes against usury, and receive more than the lawful rate of interest ?

They will not : thus where a proposition is made for a loan of money, and the lender will only consent to lend a part of the money wanted, on condition that the borrower shall receive bank stock, (or any other collateral articles,) at a price much above the market value, to make up the deficiency, and the bargain is made on such terms, the contract is usurious and void.—*Stribbling v. Bank of the Valley*, 5 Rand. 132.

Where M requested T to procure a loan of money for him, stipulating to pay T three per cent. per month, T accordingly borrowed the money of W, at legal interest, and gave him his note with an endorser. M paid T the three per cent. for his own benefit. Held that the note was not usurious.—*Coter v. Dilworth*, 8 Cowen, 299.

33. If a usurious note be void in the hands of a *bona fide* holder, will a new security given to such holder for the usurious note be good ?

It will.—*Stewart v. Eden*, 2 Caines' Rep. 150. *Chadbourn v. Watts*, 10 Mass. Rep. 121. *Kilbourn v. Bradley*, 3 Days' Rep. 268. *Jackson v. Henry*, 10 Johns. Rep. 165. *Fleming v. Mulligan*, 2 M'Cord, 173.

And a judgment in the hands of a *bona fide* assignee, it seems, is not affected by usury in the original transaction.—*Wardell v. Eden*, 3 *Johns. Cases*, 268. 1 *Johns. Rep.* 531, note.

A security, originally valid, cannot be invalidated by a subsequent usurious transaction between the original parties or privies.—*Bush v. Livingston*, 2 *Caines' Cases in Error*, 66. See *Whitworth v. Adams*, 5 *Rand.* 333. And no usurious transactions between intermediate parties, can affect the title to a note in the hands of a *bona fide* holder.—*Folty v. May*, 1 *Bay's Rep.* 486. *Johnson v. King*, 3 *M'Cord*, 365. Respecting the doctrine of usury upon discount of notes, see cases, *Wilkie v. Longhead*, 2 *Dallas' Rep.* 92. *Roosevelt & Payne v. Trezevant*, *Musgrove v. Gibbs*, 1 *Dallas' Rep.* 216. *Wyckoff v. Longhead*, 2 *Dallas' Rep.* 92. *Northampton Bank v. Allen*, 10 *Mass. Rep.* 84. *Thompson v. Thompson*, 8 *Mass. Rep.* 135. *Munn v. The Commission Company*, 15 *Johns. Rep.* 44. *Bennett v. Smith & Phelps*, 15 *John. Rep.* 355. *Powell v. Waters*, 8 *Cowen*, 669. *Stubbling v. Bank of the Valley*, 5 *Rand.* 132. *Whitworth v. Adams*, *Id.* 333. *Johnson v. King*, 3 *M'Cord*, 365.

34. Can the endorsee of a lost bill, where the bill has been endorsed in blank, recover at law against the acceptor?

He cannot, although a sufficient indemnity is tendered.—*Pierson v. Hutchinson*, 2 *Camp.* 211. *Hansard v. Robinson*, 7 *B. & C.* 90. He must resort to a court of equity for relief.—See *Walmsley v. Child*, 1 *Ves.* 341, and *exp. Greenway*, 6 *Ves. Jun.* 812. But where a bill lost has a special endorsement upon it, an action may be maintained without producing the bill.—*Long v. Bailie*, 2 *Campb.* 214. See also, *Brown v. Mersiter*, 3 *M. & S.* 281.

The holder of a negotiable note, payable to bearer, cannot maintain an action on proving it to be lost, though he show that he lost it after it became due. *Secus*, if he show that it was actually destroyed.—*Bowley v. Ball*, 3 *Cowen*, 303. See *M'Nair v. Gilbert*, 3 *Wend.* 344.

35. May a person who holds a note as trustee, sue in his own name?

He may, but a mere depository and agent must sue in the name of the principal.—*Sherwood v. Roys*, 14 *Pick.* 172.

If the payee, after suit, parts with his interest by endorsements, the suit cannot be sustained.—*Lee v. Tilson*, 9 *Conn. R.* 94.

36. May not a bill or note, payable to a fictitious person, be sued by an innocent endorsee, as a note payable to bearer?

It may. And such a bill or note is good against the drawer or maker, and will bind the acceptor, if the fact that the payer was fictitious was known to the acceptor.—*Collins v. Emmett*, 1 *H. Black's Rep.* 569. *Tallock v. Harris*, 3 *Term Rep.* 174. *Hun. v. Blodg.* 2 *Yeate's Rep.* 480.

37. Is a tender by the endorser of a note, on the day next after it has become due, sufficient, without a tender of interest?

It is not.—*City Bank v. Cutter*, 3 *Pick.* 414.

38. Is a note given to a sheriff, on an arrest, in lieu of a bail bond, valid ?

It is not ; it is void, as contrary to the statute, respecting sheriff's bonds.—*Strong v. Tompkins*, 8 *Johns. Rep.* 98.

39. Must a joint liability be proved on a suit against the survivor of two joint makers of a note ?

It must ; and payment by the deceased debtor defeats the action against the survivor, although he represented, before the transfer to plaintiff, that it was still due.—*Mott v. Petre*, 15 *Wend.* 317.

If one or two joint payees and endorsers of a note for the accommodation of maker, die before it falls due, his representatives are discharged. *Kennedy v. Carpenter*, 2 *Wheat.* 344.

Judgment and satisfaction by one of two makers, is payment for both.—*Faruel v. Hilliard*, 3 *N. H. R.* 318.

One of two promissors, on a joint and several note, is not discharged at law, by proving he was a surety, and had been injured by plaintiff's failure to sue the other.—*Kerr v. Baker, Walker*, 140. Where A signed a note on demand with the maker, and at the end of his name wrote, "surety for 90 days from date." Held a guarantee for that time only.—*Ulmer v. Reed*, 2 *Fairf.* 293.

40. Is a bill drawn in the United States, on any part of the United States, an inland bill ?

It is.—*Miller v. Hackley*, 5 *J. R.* 375.

A bank check is substantially the same as an inland bill of exchange, and the rules which are applicable to the one are generally applicable to the other.—*Cruger v. Armstrong*, 7 *J. R.* 442.

The action on a note must be brought by one who has the legal interest, or by his authority. If the payee who has negotiated it to the bank, fails, and makes an assignment, his assignee cannot sue in the name of the payee, while the property and possession are in the bank, although before trial he satisfied the bank.—*Bradford v. Buckman*, 3 *Fairf.* 15.

In an action by an endorsee, against his immediate endorser, it is a good plea in bar, that before the commencement of a suit, plaintiff transferred the note to a third person, who had ever since been the lawful owner and possessor. A replication, that the suit is prosecuted for the owner's benefit would be good.—*Waggoner v. Colvin*, 11 *Wend.* 26.

In such cases, the holder of a negotiable paper may sue in the name of a person who has no interest, and it is no defence that the suit is without his authority.

41. Has not the English statute of frauds been adopted throughout this country ?

It has ; and it requires, that, "upon any special promise to answer for the debt, default or miscarriage of another person, the agreement, or some memorandum or note thereof, must be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

An agreement to become a guarantor, or surety, for another's engagement is within the statute, and if it be a guaranty for the subsisting debt, or engagement; but the consideration for it must appear in the writing.

The word agreement, in the statute, includes the consideration for the promise, as well as the promise itself, and is an essential part of the agreement.—3 *Kent*, 121, 4th ed. This was the decision in the case of *Wain v. Walters*, 3 *Kent*. 5 *East's Rep.* 10.

And though that decision has been frequently questioned, 3 *Kent*, see *Ex parte Minet*, 14 *Ves. Rep.* 190, *Ex parte Gardom*, 15 *Ibid.* 286, it has since received the decided approbation of the courts of law, 3 *Kent*. *Saunders v. Wakefield*, 4 *Barnw. & Ald.* 595. *Jenkins v. Reynolds*, 3 *Brod. & Bing.* 14. *Morley v. Broothby*, 3 *King. Rep.* 107.

And the Ch. J. of the C. B. observed, that he should have so decided, if he had never heard of the case of *Wain v. Walters*. The English construction of the statutes of frauds has been adopted in New-York and South Carolina, and rejected in several other states.—3 *Kent*, 121-2, 4th edition. *Sears v. Brink*, 3 *Johns. Rep.* 210. *Leonard v. Verdenburgh*, 8 *Ibid.* 29. 2 *Nott & M'Cord*, 372, note. *Packard v. Richardson*, 17 *Mass. Rep.* 122. *Levy v. Merrill*, 4 *Greenleaf's Rep.* 180. *S. P. Ibid.* 387. *Sage v. Wilcox*, 6 *Conn. Rep.* 81.

The decisions have all turned upon the force of the word agreement, and where by the statute the word promise has been introduced, by requiring the promise or agreement to be in writing, as in Virginia, the construction has not been so strict.—3 *Kent*, 122, 4th ed. *Marshall, Ch. J.* 5 *Cranch's Rep.* 151-2.

Where a note is left for collection in a bank, such bank is bound to employ a competent and faithful person, to give the requisite notice to the endorsers; otherwise, it is answerable for his default.

But if the note is delivered to a notary, who is a sworn public officer, to protest it for non-payment, and to give notice thereof to the endorsers; it seems that the bank will not be liable for his neglect or default.—3 *Kent*, 122, 4th ed.

42. Is evidence that a note was delivered as an *escrow*, and that it was fraudulently put into circulation, admissible?

It is; and when the fact is shown, the holder will be bound to prove that he came fairly by the note, and paid value for it.—*Vallet et al. v. Parker*, 6 *Wend. Rep.* 615.

It seems that if the holder of a note sues the maker, and issue is joined in the cause, and the plaintiff afterwards takes a *relicta* and *cognovit actionem*, and gives the defendant a stipulation, not to take out execution on the judgment, entered upon the *cognovit*, until a certain day thereafter, before which day, according to the course and practice of the court, the cause could not have been brought to a trial, and a judgment obtained, it is not such an indulgence, or giving time to the maker, as will discharge the endorser.—*Hallet v. Holmes*, 18 *J. R.* 28.

43. Is it not a well settled principle, that no man who is a party to a negotiable note shall be permitted by his own testimony to invalidate it?

It is ; having given it the sanction of his name, and thereby added to the value of the instrument by giving it currency, he shall not be permitted to testify that the note was given for a gambling consideration, or under any other circumstances which would destroy its validity.—2 *Stra.* 955. 1 *Camp.* 3 *Camp.* 57. 4 *Camp.* 127—217. *Skinner*, 454. 1 *Gow.* 74. 8 *Taunt.* 92. 1 *Chitty's Rep.* 661. 9 *Wheat.* 587. 7 *Mass.* 238. 3 *Dall.* 416. 1 *Peters' Con. Rep.* 193. This doctrine is clearly laid down in the case of *Walton et al., Assignees of Sutton, v. Shelby*, reported in 1 *Term Rep.* 296 ; and is still held to be law, although in 7 *Term Rep.* 56, it is decided that, in an action for usury, the borrower of the money is a competent witness to prove the whole case. *Parol* evidence may be admitted to explain a written agreement where there is a latent ambiguity, or a want of consideration may be shown in a simple contract ; or, to defeat the plaintiff's action, the defendant may prove that the note was assigned to the plaintiff, in trust, for the payor.—6 *Mass.* 432.

It is competent to prove by *parol*, that a guarantor signed his name in blank, on the back of a promissory note, and authorized another to write a sufficient guaranty over it.—7 *Mass.* 233.

To show in what cases *parol* evidence may be received to explain a written agreement, and where it is not admissible, the following authorities have been referred to.—8 *Taunt.* 92. 1 *Chit.* 661. *Peake's case*, 40. *Gilbert's Rep.* 154.

44. Is any promise, founded upon the consideration of compounding a felony, valid ?

It is not ; it is void.—*Matlocks v. Owen*, 5 *Vermont Rep.* 42.

It is illegal in a private individual to suppress a prosecution for a crime, or the evidence necessary to support such a prosecution ; and a note given for money knowingly lent, to be applied to such a purpose, is void.—*Plumer v. Smith*, 5 *New Hampshire Rep.* 553.

A court of justice will not lend its aid to enforce the collection of a note, the consideration of which is an undertaking to conceal or stifle the prosecution of a felony.—*Roll v. Bagwel*, *Ohio Rep. Condensed*, 842.

45. What must appear in order to make a promise to pay a bill available against a drawer whose liability has been discharged by the laches of the holder ?

It must appear that such promise was made with a full knowledge of the fact.—*Hackley v. Miller*, *Anth. N. P.* 68.

46. Where a note is not payable at any particular place, and the maker has a known and permanent residence within the state, is not the holder bound to make a demand of payment there, in order to charge the endorser ?

He is.—*Anderson v. Drake*, 14 *J. R.* 114. As where a note was dated at New-York, but the maker, before it was payable, removed to Kingston, in Ulster county, and this was known to the holder, a demand

of payment or inquiry made for the maker, in the city of New-York, is not sufficient to charge the endorser.—*Anderson v. Drake*, 14 J. R. 114.

But where a note was dated at Albany, and the maker had removed to Canada, without the state, a demand of payment at Albany is sufficient.—*Ib.*

Where the maker of a note, dated at Albany, where the party resided, made and endorsed for his accommodation, without the knowledge or consent of the endorser, wrote in the margin of the note, "payable at the Bank of America, J. R.," and the note was discounted in that bank in the city of New-York, and payment was demanded there, and notice thereof regularly sent to the endorser, at Albany. In an action against the endorser, held, that the demand of payment and notice were not sufficient to charge the endorser, but that the demand should have been made on the maker personally, or at his residence in Albany.—*J. Cas. Contra*, S. C. 18 J. R. 315.

47. What must appear to make one liable on a promise founded on a moral obligation ?

It must appear that the obligation is strictly and undoubtedly of such a character.—*Hawley v. Farrar*, 1 Verm. Rep. 420.

Information given in good faith to a party litigant, and disclosing the names of important witnesses in his suit, may be a good consideration for a note.—*Chandler v. Mason*, 2 Vermont Rep. 193.

If the party giving the information had named himself and his wife as witnesses, it might be otherwise ; for he ought not to be permitted to speculate upon his own testimony, or to profit by it in this way.—*Chandler v. Mason*, 2 Verm. Rep. 193.

48. Is not a moral obligation a sufficient consideration for an express promise ?

It is.—*Glass v. Beach*, 5 Verm. Rep. 172. Where the only consideration of a promissory note was a promise by the payee, to convey to the maker, on payment of the note, a tract of land, if the payee should own it, and if not, to buy it of the owner as cheap as he could, and let the maker have it for what it should cost ; and the payee died insolvent before the note became due, without any title to the land—it was held that the consideration of the note might be considered as having totally failed, and that the maker had a right to treat it as a nullity.—*Tillotson v. Graves*, 4 N. Hamp. Rep. 444.

A being indebted to B, the latter agreed to receive, and did receive the note of a third person, who was an infant, in satisfaction of the debt. It was held, that, as the note received was of no value, the agreement to receive it in satisfaction, was without consideration and void.—*Wentworth v. Wentworth*, 5 New Hamp. Rep. 410.

49. Can a note or bond, given gratuitously, be enforced in equity ?

It cannot.—*Bill v. Smith, etc.*, 1 Dana's Rep. 582.

If the maker of a note gives the holder a new note, with another surety, and takes up the old one, he cannot, when called on for payment, enter into the original consideration, because he has by his act induced the holder to surrender the right which he had against the endorser, who was responsible on the original instrument. The surrender of that security is a good consideration for the new obligation.—*Coco v. Latour*, 4 *Miller's Louisiana Rep.* 507.

If a vendor promise to pay his vendee damage which the latter had sustained by being ousted from the possession of the land, it is a confession, and binds the vendor.—*Barrow v. Cazeau*, 5 *Miller's Louisiana Rep.* 72.

50. What is the maker or endorser of a note liable to pay ?

They are liable to pay the amount of said note only, except when there is a custom to protest notes or bills, when the cost of such protest also is recoverable.—*Morgan v. Reintzell*, 7 *Cranch's Rep.* 273.

For if the endorser be duly fixed by notice, it is his duty to pay, without waiting to be sued ; and it is his own fault, that subjects him to costs.—*Simpson v. Griffin*, 9 *Johns. Rep.* 131. *Steele v. Sawyer*, 2 *M'Cord Rep.* 489. *Parkes v. Drake*, *Ib.* 380.

Nor is the acceptor of a bill with funds, who has failed to pay, liable for the cost of a suit against the drawer.—*Barnwell v. Mitchell*, 3 *Conn. Rep.* 101.

51. Where the holder of a promissory note has obtained possession of it by fraud, can he maintain an action upon the note against any of the parties to it ?

He cannot.—*Tallman v. Gibson*, 1 *Hall's Rep.* 308.

Possession is *prima facie* evidence of the transfer to the holder, yet if the defendant can show that the plaintiff obtained the note by his own fraudulent act, he has a right to defeat the action on that ground, although he may be liable to pay the note to the true owner.—*Talman v. Gibson*, 1 *Hall's Rep.* 308.

The consideration, merely, on which the note was received by the holder, is not to be questioned, but the defendant may show that no consideration was paid by the holder, as one step toward the proof of fraud on his part, in obtaining the note.—*Ib.*

It seems that the defendant cannot require proof of consideration on the part of the plaintiff in such a case, unless he has given seasonable notice to the plaintiff that he means to insist at the trial, that he shall prove the consideration on which he received the note.—*Talman v. Gibson*, 1 *Hall's Rep.* 313.

52. In an action against the acceptor of a bill of exchange, is it necessary the holder should show a demand of payment ?

It is not. It is the business of the acceptor to show that he was ready at the day and place appointed, but that no one came, and that he was always ready afterwards to pay.—*Foden v. Sharp*, 4 *J. R.* 183.

53. Where a negotiable promissory note endorsed in blank by the payee, has been fraudulently or feloniously taken from the true owner, and that fact is shown at the trial, can the person into whose hands it passes, recover upon it against the maker ?

He cannot, unless he shows himself to be an innocent and *bona fide* holder for a valuable consideration.—*The Fulton Bank v. Phenix Bank*, 1 *Hall's Rep.* 562. *The Phenix Bank of the City of New-York*, issued a post note, payable in sixty days after date to *J G* or order on demand ; this note being endorsed by *J G*, was put into the mail at Charleston, in the State of South Carolina, to be transmitted to New-York, but the mail being robbed it never came into the hands of the true owners, but passed into the possession of Prime, Ward, King & Co., who deposited it in the Fulton Bank and received credit for a like amount, in account with the bank. The plaintiff presented the note to the Phenix Bank for payment, and it was refused, upon the ground that the note was stolen from the true owners, who had requested the defendants not to pay it. The amount of the note, although passed to the credit of P. W. K. & Co., by the Fulton Bank, had never been drawn out by them, and upon action brought by the Fulton Bank against the makers, to recover the amount of the note, it was held, that the mere act of giving credit to P. W. K. & Co., for that amount, by the Fulton Bank upon their books, did not constitute them as *bona fide* holders of the note for a valuable consideration.—*The Fulton Bank v. The Phenix Bank*, 1 *Hall's Rep.* 562.

Where a bill is drawn on persons residing in A, payable in B, without any particular spot in the latter place being designated where payment is to be made, after the holder has protested the bill for non-acceptance in the place on which it is drawn, he is not bound to make any inquiry after the drawee in B, where it is payable, but it will be sufficient if he cause it to be protested in that place.—*Root v. Franklin*, 3 *J. R.* 207.

54. May a note be negotiated during the days of grace ?

It may. The days of grace on negotiable notes constitute a part of the original contract ; and the negotiability of the note is as unrestricted during those days as before their commencement.—*The Savings' Bank of New Haven v. Bates*, 8 *Com. Rep.* 505. An action brought against the maker of a promissory note on the third day of grace, is prematurely brought.

In a suit by the payee upon a note alleged to be lost, the defendant may show the note was passed away by the payee by delivery, without assignment.—*Burton v. Dees*, 4 *Yerger's Rep.* 4. A party in interest may convey his legal title in a note to a third person, and by such conveyance give that person a right to sue in his own name. In such a case, the defendant may offer every defence to the suit by the agent, which he could present against the action of the principal. The agent can only be considered as the nominal plaintiff.—*Lacoste v. De Armas*, 2 *Miller's Louisiana Rep.* 263.

A mutual understanding or agreement, between the obligor and obligee of a note, to have the contract for which it is given rescinded, and the

note cancelled, will be considered binding, although omitted or neglected to be actually carried into effect; and a recovery on the note will be withheld.—*Benson v. Smith*, 2 *Miller's Louisiana Rep.* 103.

In a suit between the endorsee, who is the holder, and the drawer and endorser of a bill of exchange, the consideration may be impeached, and the question whether the drawer ever received consideration or payment, therefore, inquired into.—*Booker v. Lastrapes*, 2 *Miller's Louisiana Rep.* 52.

55. If the note contain the words "I promise not to pay," will it be held a valid note?

It will.—*Bayley on Bills*, 4th ed. 6.

56. Is it necessary to state the place of the real date in actions on bills of exchange and promissory notes?

It is not in either case.—*Bayley on Bills*, 173. 3 *Campb.* 304.

57. Is a demand of the cashier, sufficient on a note payable at a bank?

It is.—*Crenshaw v. McKiernen*, 1 *Minor's Alabama Rep.* 295.

58. Is a notary, on protesting a note for non-payment, bound to give notice to all the endorsers?

He is.—*Morgan v. Van Ingen*, 2 *J. R.* 204.

59. What if the sheriff take a promissory note in satisfaction of a *casa*, and discharge the defendant?

The note would be void without the authority of the plaintiff, as between the sheriff and the maker, and the plaintiff may sue the sheriff for an escape, or take a new execution.—*Armstrong v. Garrow*, 6 *Cow.* 465.

60. Is not evidence that the maker of a note cannot be found when it is due, sufficient to support a general averment that the note was presented and payment refused?

It is.—*Stewart et al. v. Eden et al.*, 2 *Caines' Rep.* 121.

If the endorser of a note die before it fall due, and the holder in an action against the executors, state that the endorser promised in his lifetime, to pay, it is fatal, the assumption should be stated to have been made by the executors.—*Ibid.*

61. Is it absolutely requisite that the notice of non-payment should be in writing?

It is not; a verbal notice is sufficient.—*Culger v. Stevens*, 4 *Wend. Rep.* 566.

Notice of protest sent to a town where a note bore date, where the officers of the bank were told by the person who presented it for discount the endorser resided; and where in fact he did reside, until a few weeks

previous to the date of the note, was held sufficient to charge the endorser.—*Bank of Utica v. Davidson*, 5 *Wend. Rep.* 587. 2 *Leigh's Rep.* 650.

62. Can one holding a check or note, payable to bearer, as a mere agent, sue on it in his own name ?

He can ; and it does not lie with the opposite party to object the plaintiff's want of interest.—*Mauror v. Lamb*. 7 *Cow.* 174.

63. Where a promissory note be endorsed long after it falls due, may it be declared on as endorsed when it was due ?

It may.—*Parsons v. Parsons*, 5 *Cow.* 476. In declaring on a promissory note, it is enough to allege that the defendant made his certain note in writing, etc., without averring that he delivered it.—*Russel v. Whipple*, 2 *Cow.* 536. A note must be supposed to be endorsed on the day mentioned in the declaration, until the contrary is shown.—*Thorne v. Woodhull*, *Anth. N. P.* 103.

54. Is an averment in the declaration, or proof at the trial of a demand of payment at the place designated, necessary ?

It seems not ; as against the maker of a promissory note, or against the acceptor of a bill of exchange.—*Bank of the United States v. Smith*, 11 *Wheaton*, 171.

But as against the endorser of a bill or note, such averment and proof is in general necessary.—*Ibid.*

Where the bill or note is made payable at a particular bank, and the bank itself is the holder, such averment and proof may be dispensed with ; and all that is necessary, is for the bank to examine the account of the maker with them, in order to ascertain whether he has any funds in their hands.—*Ib.*

65. May not a bill of exchange endorsed by the treasurer of the United States, be declared on, in the name of the United States ?

It may, and an averment that it was endorsed immediately to them will be good.—*U. S. v. Jacob Barker*, 1 *Paine*, 156.

Where the endorsee of a bill of exchange, whether as agent or owner, returns it after protest to the last endorser, the latter may sue upon it in his own name, and at the trial strike out the last endorsement, although it be in full ; and prior blank endorsements may be filled up at the trial, so as to correspond with the declaration. Where both these were omitted to be done, the court on error refused to reverse the judgment, considering the objection as one of form, and cured by the thirty-second section of the judiciary act of September 24th, 1789.—*Ch.* 20. *Ibid.*

Where a bill was drawn in New-York on Liverpool, during a period of war, the lapse of three months before it is presented, is not unnecessary or fatal delay.—*Ibid.*

When the facts are disputed, the question whether due notice of pro-

test has been given, is a question of law. The United States were the holders of a foreign bill of exchange, drawn by the bankrupt, negotiated in the regular course of trade, and returned protested for non-payment, and are entitled to a preference out of the estate of the bankrupt to the whole amount of the claim.—*United States v. Fisher*, 3 *Cranch*, 258. 1 *Cond. Rep.* 421.

Where a bill of exchange was endorsed to T, treasurer of the United States, who received it in that capacity, and for account of the United States, and the bill had been purchased by the secretary of the treasury, as one of the commissioners of the sinking fund and as agent of the board, with the money of the United States, and was afterwards endorsed by T to W and S for acceptance and protested by them, presented to the drawer for acceptance, and protested for non-acceptance and non-payment, and sent back by W and S to the secretary of the treasury; held, that the endorsement to T passed such an interest to the United States, as enabled them to maintain an action on the bill against the prior endorser.—*Dugan et al. v. The United States*, 3 *Wheaton*, 172. 4 *Condensed Rep.* 223.

66. Is the secondary evidence of the contents of a written instrument admissible?

It is, wherever it appears that the original is destroyed, or lost, by accident, without any fault of the party.—9 *Wheaton*, 581.

In the case of a lost note, it is not necessary that its contents should be proved by a notarial copy; all that is required is, that it should be the best evidence the party has in his power to produce.—*Ibid.*

To admit a secondary evidence of a lost note, it is not necessary that there should be a special count in the declaration upon a lost note.—*Ibid.*

67. Will the holder of a promissory note discharge the endorser, by not issuing, or by not countermanding an execution against the maker?

He will not.—*Lenox v. Prout*, 3 *Wheaton*, 520.

Bills of exchange and negotiable promissory notes are distinguished from all other parol contracts, by the circumstance that they are *prima facie* evidence of valuable consideration, both between the original parties and against third persons.—*Mandeville v. Welch*, 5 *Wheaton*, 277.

68. Must not an endorser of a protested bill of exchange in an action against the drawer produce the bill?

He must either produce the bill or account for not doing so by proving it to be lost, or in a situation not to be again brought against the defendant.—*Assignees of Palmer v. Assignees of Blight*, 2 *Washington Circuit Court Reports*, 96.

69. If an endorser is once fixed by notice of non-acceptance of the bill, will any delay of the holder to return the bill and demand payment, take away the right of recovery?

It will not; notwithstanding the drawer may have failed in the intermediate time.—*Wild v. Bank of Passamaquoddy*, 3 *Mason*, 505.

70. May not the payor of an instrument which passes by delivery, and which is alleged to be lost, require the claimant to account for its loss?

He may, or if it be mutilated, to account for the same, and to prove that he came fairly into possession of it.—*Bullet v. The Bank of Pennsylvania*, 2 *Wash. C. C. R.* 172.

71. Is or is not a bill drawn in New Orleans upon Philadelphia a foreign bill?

It is.—*Lonsdale v. Brown*, 4 *Wash. C. C.* 81. *Buckner v. Finley*, 2 *Peters*, 586. *Townsley v. Sumrall*, 2 *Peters*, 170. *Bank U. States v. Daniels*, 12 *Peters*, 32.

72. Suppose the rate of exchange should vary after the protest of a bill and payment, how is it to be regulated?

It would be regulated at the rate of exchange, at the time of notice of the protest being given. This is the settled law in New-York.—*Jacob Barker v. The U. S.*, 1 *Paine*, 156.

73. If a bill payable after date, be held by a bank for collection, and the bank fail to give notice to the drawer that the drawee was not to be found at home, when called upon to accept the bill, will that fact discharge the endorser from his liability?

It will not.—*Bank of Washington v. Triplett & Neale*, 1 *Peters*, 35.

74. Is the holder of a note, payable in specific articles, bound to receive them at a place or on a day different from that appointed in the note?

He is not.—*Erwin v. Cook*, 2 *Devereau's Rep.* 183. A note was executed, payable in money, but dischargeable in salt by a given day. Held, that if the salt is not delivered by the day specified, the money is due.—*Stewart v. Donnelly*, 4 *Yerger's Rep.* 177.

75. Where A puts the name of B to a promissory note without any authority from B, and the note is delivered to the payee for a valuable consideration, is not A liable in an action against him in his true name on the note, upon a count alleging that he made the note by the name of B?

He is.—4 *New Hampshire Rep.* 239.

76. If infancy be set up against a note executed in a foreign country, is not the party bound to show that, by the law of such country, such plea is good defence?

He is.—*Thompson v. Ketchum*, 8 *Johns. Rep.* 189. A note made by an infant, for a valuable consideration, but not for necessities, is not con-

firmed by a clause in his will, made after coming of age, directing all his just debts to be paid.—*Smith v. Mayo*, 9 *Mass. Rep.* 6.

77. Where a bill is drawn payable in a foreign country, will payment in the current money of that country be good?

That will depend upon the intention of the parties, and their reference in the contract to the *lex loci*.—*Sealright v. Galbraith*, 4 *Dallas' Rep.* 325. For where it appears that the performance of the contract, in the contemplation of the parties, has relation to the laws of another country, the contract must be interpreted according to those laws.—*Powers v. Lynch*, *Hicks v. Brown*.

78. If a bill be drawn in England, on a firm in Boston, payable to the drawer himself, or order, and be accepted by one of the firm then in England, payable in London, is it a foreign or an inland bill of exchange?

It is a foreign bill of exchange, and on non-payment, it is to be governed by the laws of Massachusetts, as to damages.—*Grimshaw v. Bender*, 6 *Mass. Rep.* 157.

79. How, in law, is a person deemed where he adds at the bottom of a note of another, that he acknowledges himself to be holden as a surety for the note?

He is, in law, deemed an original joint-promissor.—*Hunt v. Adams*, 6 *Mass. Rep.* 219. *Leonard v. Vredenburg*, 8 *Johns.* 295.

80. How will an assignment of a note, made during the pendency of a suit, operate?

It will operate as a discontinuance of the suit.—*Hall v. Gentry*, 1 *Marsh*, 555.

81. Is it sufficient, if a bill be addressed to W S by mistake for J S, and is presented to the right person?

It is, and in the declaration it may be stated, that the bill was drawn, W S meaning the said J S.—*Sterry v. Robinson*, 1 *Day's Rep.* 11.

82. What if there be no averment of the value of the foreign money in a bill?

The defect is cured by a verdict.—*Brown v. Burr*, 3 *Dallas*, 365.

83. Upon a note payable in a certain number of years, with interest in the mean time annually, upon what can judgment be recovered upon default of payment of the interest?

It can be recovered only for the interest.—*Hastings v. Wiswall*, 8 *Mass. Rep.* 455. *Greenleaf v. Kellogg*, 3 *Mass. Rep.* 568. *Cooley v. Rose*, 3 *Mass. Rep.* 221. And the interest so recoverable, is simple interest, only upon the principal sum, although several years' interest be in arrear.

—*Hastings v. Wiswell*, 8 Mass. Rep. 455. And interest is payable only according to the law of the place where the note is drawn, and is to be paid, though sued elsewhere.—*Jordan v. Sharp*, 4 Johns. Rep. 183. *Slocum v. Pomeroy*, 6 Cranch, 221.

83. Are damages on a protested bill of exchange given as a liquidated arbitrary mulct?

They are not; but as a compensation for the expense of remitting the money to the place where the bill ought to have been paid; and therefore, if the holder receive a part of the money of the acceptor, this diminishes the damages, *pro rata*.—*Bangor Bank v. Hook*, 5 Greenleaf, 174.

84. Can one of several partners, who has himself signed a joint promissory note, be made liable by the act of another, afterwards altering the note, and making it joint and several?

He cannot. And a letter by the first, in answer to an application for payment, that the circumstances should have his earliest attention, is not sufficient to establish his assent to the alteration; for giving attention to a matter, is very different from giving assent, and the assent of the other partners would only bind the first with respect to acts necessary to carry on the partnership, and they have no authority to make a joint and several note, binding on a partner who does not sign, where the note is not subscribed in the name of the firm, but by the individuals severally composing it.—*Greenslade v. Dower*, 7 Bar. & C. 635. *Pring v. Hope*, 4 Bing. 32. 12 Moore, 135 S. C.

85. If a partnership be about to be formed, can one of the intended partners, in order to raise his share of the capital, issue a bill in the name of the firm so as to bind them?

He cannot.—See observations of the judges in *Greenslade v. Dower*, and another, 7 Bar. & C. 635, *supra*; and *Saville v. Robertson*, 4 T. R. 720. There the plaintiff had, previously to the formation of a partnership, advanced a sum of money to one of the intended partners, to enable him to become one of the firm. It was held that the plaintiff could not recover on a bill afterwards drawn by such party, in the name of the firm, in payment of such advance; and that the other partners might defend the action without giving any notice of the intention to dispute the consideration.—*Green v. Deakin and others*, 2 Stark, R. 347.

86. Can a bill in France be drawn upon a person residing where the drawer is domiciled?

It cannot; but must be drawn upon a person in another place; but they give effect to bills drawn differently in foreign countries where the local regulations do not prevail.—1 Pardess. 346, 480. In the French law there are certain rules prescribed as to the consequences of defects in bills and who shall take advantage of them.—1 Pardess. 478—499.

87. If by mistake an endorsement has been erased by a third person, will the endorser continue liable?

He will.—*Wilkinson v. Johnson*, 5 Dowl. & R. 403, and 3 Bar. & C. 428, S. C. *Coxe v. Troy*, 5 Bar. & A. 474. 1 Dowl. & R. 38, S. C. 1 Pardess. 373.

And where the agent of a person whose name was forged as an endorser paid the bill for his honor, and cancelled the subsequent endorser's name, it was held in an action by such agent, against the person to recover back the money, that such cancellation did not discharge the endorsers, and that the person so sued might nevertheless sue them, so that the cancellation had not prejudiced his security on the bill.—*Wilkinson v. Johnston*, 5 Dowl. & R. 403. 3 Bar. & C. 428.

88. If ten merchants employ one factor, and he draw a bill upon them all, and one accept it, who are bound by this acceptance?

He who accepts it only, and not the rest.—*Pinkney v. Hall*, H. 8. W. 111. Salk. 126.

89. Is a note given for compounding a misdemeanor recoverable by law?

It is.—2 Esp. 643.

90. If the endorser accepts any part of the money from the acceptor, can he afterwards resort to the drawer for the remainder of the money?

He cannot; unless he give timely notice to the drawer that the bill is not duly paid; for where a man takes a part of the money only, and does not apprise the drawer that the whole is not paid, he gives a new credit for the remainder. But where timely notice is given, that the bill is not duly paid, the receiving part of the money from an acceptor or endorser, will not discharge the drawer or other endorsers; for it is for their advantage that as much should be received from others as may be.—*Johnson v. Kenyon or Kenyon*, C. B. H., 5 George 3. 2 Wils. 262.

The premature payment of a check the day before it bore date, which had been lost by the payee, was held to be invalid, and that the banker was liable to repay the amount to the loser, it being proved to be contrary to the usual course of business; this was much relied on in *Grant v. Vaughan*, 3 Burr. 1516. *Peacock v. Rhode*, Doug. 611. *Miller v. Race*, 1 Burr. 432. *Gill v. Cubitt*, 3 Bar. & Cres. 475. Per *Bailey*, J. *Snow v. Peacock*, 2 Carr. & P. 222. *Best*, C. J., said, "that the course of business must require, in the usual and ordinary manner of conducting it, a proper and reasonable degree of caution necessary to preserve the interests of trade;" to pay drafts, before the day on which they are dated, is not according to the usual course of business.—*De Silva v. Fuller*, sittings at London, Easter, 1776, Selw. Cases, 238.

91. Is not the protest on a bill a good evidence of non-acceptance or non-payment?

It is ; and the attestation of the notary under his seal, is evidence of the protest without further proof, of showing how he came by it.—*Anon.* 12 *Mod.* 345.

92. Are not promissory notes governed by the rules that apply to bills ?

They are. The statute of 3d and 4th Anne, made promissory notes payable to a person, and to his order, or bearer, negotiable, like inland bills, according to the custom of merchants. That statute has been generally adopted in this country, either formally or in effect, and promissory notes are every where negotiable.

Promissory notes are negotiable throughout the Union, and the endorsee can sue in his own name ; and in New-York, Massachusetts, Virginia, South Carolina, and most of the states, he has all the privileges of an endorsee under the law merchant.

But in Vermont, New Jersey, Pennsylvania, and Kentucky, his rights under the law merchant, are to be taken with some qualifications, and especially in the state last mentioned.—See *Griffith's Law Register, passim.* 3 *Kent*, 72, 4th ed.

The effect of the statute is to make notes, when negotiated, assume the shape and operation of bills, and to render the analogy between them so strong, that the rules established with respect to the one, apply to the other.—*Heylen v. Adamson*, 2 *Burr. Rep.* 669. *Brown v. Harraden*, 4 *Term Rep.* 148.

It was a question much discussed before the statute of Anne, whether notes were not, by the principles of the law merchant, to be treated as bills, and Lord Holt vigorously and successfully resisted every such attempt.—*Clerke v. Martin*, 2 *Lord Raym.* 757. The history of that struggle is no longer interesting ; but there is no doubt that promissory notes were recognized as mercantile instruments, and a species of bills of exchange, by the common law and usage of trade, and even by the French ordinance of 1673, long before Lord Holt asserted them to be of late English invention. The *Pragmatic of Pope Pius v. De Cambiss*, as early as 1571, is mentioned by Mr. Du Ponceau, in his able and interesting dissertation on the nature and extent of the jurisdiction of the courts of the United States, 122, as proof the early recognition of notes as negotiable instruments, within the custom of merchants.

DECISIONS IN THE S. C. OF THE UNITED STATES.

1. Is it necessary in an action on a bill of exchange, which had been protested for non-payment, to aver in the declaration that the bill had been protested for non-acceptance ?

It is not.—*Brown, plaintiff in error v. Barry*, H. 5. 3 *Dall.* 365. 1 *Cond. Rep.* 165.

As to bills of exchange, drawn in the United States, payable in Eu-

rope, the custom of merchants in this country does not ordinarily require, to recover on a protest for non-payment, that a protest for non-acceptance shall be produced, though the bills were not accepted.—*Ibid.*

Bills of exchange, unaccompanied by protests for non-acceptance, but which had been protested for non-payment, were admitted in evidence.—*Clarke v. Russel*, 193. 3 *Dall.* 415.

2. Is not the endorser of a promissory note, given for the accommodation of the maker, entitled to strict notice of its non-payment?

He is.—*French's Executors v. the Bank of Columbia*, 2 *Condensed Rep.* 58.

If the drawer of a bill of exchange, at the time of drawing, has a right to expect that his bill will be honored, although he has no funds in the hands of the drawer, he is entitled to strict notice.—*Ibid.*

In reason it would seem that the necessity of notice of non-acceptance or non-payment of a bill of exchange ought to be dispensed with only in those cases where notice must be unnecessary or immaterial.—*Ibid.*

Where the money raised upon the note is received by the endorser, so that the note is discounted, in truth, for his accommodation, not for that of the maker, he is unquestionably without funds in the hands of the acceptor, must expect to pay the note himself, and cannot require notice of its non-payment by the drawer.—*Ibid.*

The defendants having ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, they are bound to accept and pay his bills; and if they do not he may recover from them the bills, and damages and costs of protest, (if he has paid the same,) upon account for money paid, laid out, and expended, and the bills of exchange may be given in evidence on that account.—*Riggs v. Lindsay*, *Ibid.*, 585.

A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise.—*Coolidge et al. v. Payson et al.* 4 *Cond. Rep.* 33. 2 *Wheaton*, 66.

3. What is the prevailing inducement for considering a promise to accept, as an acceptance?

It is that thereby credit is given to the bill.—*Ibid.*

A demand of payment of a promissory note of the maker, on the last day of grace, and where the endorser resides in a different place, notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the succeeding day.—*Lenox v. Roberts*, *Ibid.*, 163. 3 *Wheaton*, 373.

An action of debt will lie by the payee or endorsee of a bill of exchange against the acceptor, where it is expressed to be for value received.—*Balor et al. v. Peyton*, *Ibid.*, 173. 2 *Wheaton*, 385.

Debt will lie by the payee against the maker, when the note is expressed for value received.—*Ibid.*

4. If a person who endorses a bill to another, whether for value, or for the purpose of collection, comes again to the possession thereof, how is he to be regarded?

He is to be regarded, unless the contrary appears in evidence, as the *bona fide* holder and proprietor of the bill, and is entitled to recover thereon, notwithstanding there may be on it one or more endorsements in full, subsequent to the endorsement to him, without producing any receipt or endorsement back to him from either of such endorsers, whose names he may strike from the bill or not, as he thinks proper.—*Dugan's Executors v. The United States, Ibid.*, 223. 3 *Wheaton*, 172.

The endorser of a promissory note, who has been charged by due notice of the fault of the maker, is not entitled to the protection of a court of equity as a surety; the holder may proceed against either party at his pleasure, and does not discharge the endorser by not issuing, or by countermanding an execution against the maker.—*Lenox v. Prout, Ibid.*, 311. 3 *Wheaton*, 520.

Bills of exchange and negotiable promissory notes, are distinguished from all other parol contracts, by the circumstance that they are *prima facie* evidence of valuable consideration, both between the original parties, and against third persons.—*Mandeville v. Welch, Ibid.*, 642. 5 *Wheaton*, 277.

5. Is not a bill of exchange an assignment to the payee, of the debt due from the drawee to the drawer?

It is.—*Ibid.*

But this doctrine only applies to cases where the entire chose in action has been assigned, and not to a partial assignment.—*Mandeville v. Welch, Ibid.*, 642. 5 *Wheaton*, 277.

6. Where the second day of grace falls on Saturday, is not that the last day of grace?

It is; and notice of non-payment given to the drawer of a bill on that day, after the demand upon the acceptor on the same day, is sufficient to charge the drawer.—*Blussard v. Levering*, 5 *Cond. Rep.* 19. 6 *Wheat.* 102.

Notice to the drawer, by putting the same into the post-office, where the persons live in different places, is good.—*Ibid.*

After demand of the maker of a note, on the third day of grace, notice to the endorser, on the same day, is sufficient by the general law of merchants.—*Linderberger v. Beall, Ibid.*, 20. 6 *Wheaton*, 104.

Evidence of a letter containing notice, having been put into the post-office, directed to the endorser at his place of residence, is sufficient proof of the notice to be left to the jury, and it is unnecessary to give notice to the defendant to produce the letter before such evidence can be admitted.—*Ibid.*

No protest of a promissory note, or inland bill of exchange, is necessary.—*Young v. Bryan, Ibid.*, 44. 6 *Wheaton*, 146.

A protest of an inland bill or promissory note is not necessary, nor is it evidence of the facts stated in it.—*The Union Bank v. Hyde, Ibid.*, 189. 6 *Wheaton*, 572.

The following undertaking of the endorser of a promissory note, "I do request that hereafter any notes that may fall due on which I am or may be endorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been or should be legally protested;" was held to be ambiguous as to whether it amounted to a waiver of demand and notice; and parol proof admitted to show that it was the understanding of the parties, that the demand and notice required by law to charge the endorser, should be dispensed with.—*Ibid.*

A bill or note is *prima facie* evidence, under a count for money had, and received against the drawer or endorser.—*Paiges' Administrator v. The Bank of Alexandria, Ibid.*, 222. 7 *Wheaton*, 35.

But the presumption that the contents of the bill or note have been received by the party sued, and for the use of the plaintiff, may be rebutted by circumstances; and a recovery cannot be had, in such a case, where it is proved that the money received was actually by another party.—*Id.*

The negotiability of a promissory note payable to order, is not restrained by the circumstances of its being given for the purchase of real property in Louisiana, and the notary, before whom the contract of sale is executed, writing upon it the words, "*ne varietur*," according to the laws and usages of that state, and other countries governed by the civil law.—*Fleckner v. The Bank of the United States, Ibid.*, 457. 8 *Wheaton*, 338.

In a declaration upon a promissory note, the omission of the place where it is payable is fatal.—*Selvie v. Dorr, Ibid.*, 677. 9 *Wheaton*, 558.

By the custom of the banks in the District of Columbia, payment of a promissory note is to be demanded on the fourth day after the time limited for the payment thereof, in order to charge the endorser, contrary to the general law of merchants, which requires a demand on the third day.—*Renner v. The Bank of Columbia, Ibid.*, 691. 9 *Wheaton*, 581.

The general rule of law is, to demand payment on the third day of grace; but it may be varied by evidence of a different usage.—*Ibid.*

Evidence of such a local custom is admissible, in order to ascertain the understanding of the parties, with respect to their contracts, made with reference to it.—*Ibid.*

The declaration against the endorser, in such a case, must lay the demand on the fourth and not on the third day.—*Ibid.*

Quere, whether a declaration, in such a case, not averring the local usage, would be good upon demurrer.—*Ibid.*

Secondary evidence of the contents of written instruments is admissible, whenever it appears that the original is destroyed, or lost, by accident, without any default of the party.—*Ibid.*

In the case of a lost note, it is not necessary that its contents should be proved by a notarial copy; all that is required, is, that it should be the best evidence the party has it in his power to produce.—*Ibid.*

To admit secondary evidence of a lost note, it is not necessary that there be a special count of in the declaration upon a lost note.—*Ibid.*

Where the maker of the note has removed into another state, or another jurisdiction, subsequent to the making of the note, a personal demand upon him is not necessary to charge the endorser, but it is sufficient to present the note at the former place of residence of the maker.—*McGruder v. The Bank of Washington, Ibid, 701.* 9 *Wheaton*, 598.

In general, a payment received in forged paper, or in any base coin, is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand.

But this principle does not apply to a payment made *bona fide* to a bank, in its own notes, which are received as cash, and afterwards discovered to be forged.

Bank notes are a part of the currency of the country; they pass as money, and are a good tender, unless specially objected to.—*See note at the end of the case.*

In case of such a payment upon general account, an action may be maintained by the party paying the notes, if there is a balance due him from the bank upon their general account, either upon an *insimul computasset*, or as for money had and received.—*Bank of the United States v. The Bank of Georgia*, 6 *Cond. Rep.* 120. 10 *Wheaton's Rep.* 333.

This cause was argued by Mr. Sergeant, for the plaintiffs, who cited: *Bolton v. Richards*, 6 *Term Rep.* 139. *The Manhattan Company v. Liding*, 4 *Johns. Rep.* 377. *Levy v. The Bank of the United States*, 4 *Dall. Rep.* 234. *S. C.* 1 *Binn. Rep.* 27. *Chitty on Bills*, 483. *Smith v. Chester*, 1 *Term Rep.* 655. *Bass v. Clive*, 4 *Maul. & Selw.* 15. *Master v. Miller*, 4 *Term Rep.* 320. *Barler v. Gignell*, 3 *Esp. N. P.* 60. *Fordain v. Lashbrook*, 7 *Term Rep.* 604. *Price v. Neal*, 3 *Burr. Rep.* 1354. *Jones v. Ryde*, 5 *Taunt. Rep.* 488. *Markle v. Hatfield*, 2 *Johns. Rep.* 462. *Gloucester Bank v. The Salem Bank*, 17 *Mass. Rep.* 33. *Smith v. Mercer*, 6 *Taunt. Rep.* 76. *Meade v. Young*, 4 *Term Rep.* 28. *Jenys v. Fowler*, 2 *Str. Rep.* 946.

Mr. Berrien, for the defendants, cited: *Gates v. Winslow*, 1 *Mass. Rep.* 66. *Meade v. Young*, 4 *Term Rep.* 28. *Kyd on Bills*, 202, 203. *Lambert v. Oakes*, 1 *Lord Raym.* 443. *Union Bank v. The Bank of the United States*, 3 *Mass. Rep.* 74. 1 *Johns. Cases*, 145. 5 *Johns. Rep.* 68. 2 *Term*, 366. *Buller v. Harrison*, *Cowp.* 565. *Miller v. Race*, 1 *Burr. Rep.* 457. 2 *Evans' Pothier*, 19, 495. *Foly v. Barber*, 5 *Johns. Rep.* 72.

It seems, that, as against the maker of a promissory note, or against the acceptor of a bill of exchange, payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment at the place designated is necessary.—*Bank of the United States v. Smith, Ibid, 257.* 11 *Wheaton*, 171. *See note at the end of the case.*

7. But as against the endorser of a bill or note, is not such an averment, and proof in general, necessary?

It is.—*Ibid.*

Where the bill or note is made payable at a particular bank, and the bank itself is the holder, such averment and proof may be dispensed with,

and all that is necessary, is, for the bank to examine the account with them, in order to ascertain whether he has any funds in their hands.—*Ibid.*

No precise form of notice to the endorser of a promissory note is necessary ; and it is not necessary to state in the notice, who is the holder ; nor will a mistake as to the date of the note, vitiate the notice, if it conveys to the party a sufficient knowledge of the particular note which has been dishonored. *Mills v. The Bank of the United States, Ibid, 373. 11 Wheaton, 431.* It is not necessary that the notice contain a formal allegation, that it was demanded at the place where payable ; it is sufficient that it states the facts of non-payment of the note, and that the holder looks to the endorser for indemnity.—*Ibid.*

By the general law, demand of payment of a bill or note, must be made on the third day of grace ; but where a note is made for the purpose of being negotiated at a bank, whose custom it is to demand payment, and give notice on the fourth day, that custom forms a part of the law of the contract, and it is not necessary that a personal knowledge of the usage should be brought home to the endorser for that purpose.—*Ibid.*

The general rule of law, requiring proof of the title of the holders of a note, may be modified by a rule of court, dispensing with proof of the execution of the note, unless the party shall annex to his plea an affidavit that the note was not executed by him.—*Ibid.*

An unconditional promise, by the endorser of a bill or note, to pay it, or the acknowledgment of his liability, after knowledge of his discharge from his responsibility by the laches of the holder, amounted to an implied waiver of due notice of a demand from the drawee, acceptor or maker.—*Thornton v. Wynn, Ibid, 508. 12 Wheaton, 183.*

So an acknowledgment of the drawer's or endorser's liability has the same effect.—*Ibid.*

Knowledge of the fact of the laches of the holder is essential to charge the endorser upon his promise or acknowledgment.—*Ibid.*

Wherever the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the endorsers, as in a transaction between private individuals.—*United States v. Barker, Ibid, 641. 12 Wheaton, 559.*

Where the United States were the holders of certain bills of exchange, and their agent in New-York was directed, by a letter from the secretary of the treasury, dated Washington, December 7th, 1814, to give notice of non-acceptance to the drawer and endorsers, residing in New-York, and notice was given to the endorser, on the 12th of the same month, the mail which left the 8th having arrived at New-York, at thirty-five minutes past 10 o'clock A. M. on the tenth. Held, that the endorser was discharged by the negligence of the holders.—*Ibid.*

So, also, where the United States were the holders of other bills, and their agent in New-York was directed by a letter from the secretary of the treasury, dated Washington, May 8th, 1815, to give notice of non-payment to the drawer and endorsers, residing in New-York, and notice was given to the endorser on the 12th of the same month, the mail which left Washington on the 8th reached New-York, early on the morning of the

11th. Held, that the endorser was discharged by the negligence of the holders.—*Ibid.* (See note at the end of the case.)

As to the obligation of the holder of a promissory note, to sue the drawer in order to charge the endorser.—*Notes, Ibid.* 639.

Application of the law of bills of exchange to cases in which the United States are parties to the instrument.—*Notes of Cases, Ib.,* 643.

8. What if a bank fail to make demand of payment of a bill held for collection ?

The bank thereby makes the bill its own, and becomes liable to its owner for the amount.—*The Bank of Washington v. Triplett & Neal, 1 Peters' S. C. Rep.* 31.

The deposit of a bill in one bank to be transmitted to another, for collection, is a common usage, of great public convenience, the effect of which is well understood ; and the duty of a bank, holding such a bill for collection, is precisely the same, whoever may be the owner thereof ; and if it be unwilling to undertake the collection without precise information on the subject, the duty ought to be declined.—*Ibid.*, 30.

The allowance of days of grace for the payment of a bill of exchange or note, is now universally understood to enter into every bill or note of a mercantile character ; and so to form a part of the contract, that the bill does not become due until the last day of grace.—*Ibid.*, 31.

It is the usage of the bank of Washington, and of other banks in the District of Columbia, to demand payment of a bill on the day after the last day of grace ; and this usage has been sanctioned by the decisions of this court. This usage is equally binding upon parties who are not acquainted with its existence, but who have resorted to the bank governed by such usage, to make the bill negotiable.—*Ibid.*, 32.

Parol is admissible to show an agreement relative to the place where payment of a note was to be demanded ; although the agreement did not appear on the face of it. Such an agreement is a circumstance extrinsic to the contract made by the note, and proof by parol is regular.—*Brent's Exrs. v. Bank of the Metropolis, ibid.*, 92.

9. Does the usage of the place on which a bill is drawn, or where payment is demanded, uniformly regulate the number of days of grace which must be allowed ?

It does.—*Ibid.*, 34.

The failure of a bank holding a bill payable after date for collection, to give notice to the drawer that the drawee was not found at home, when called upon to accept the bill, is not such a negligence as discharges the drawer from his liability.—*Ibid.*, 35.

A bill of exchange payable after date, need not be presented for acceptance before the day of payment, but if presented, and acceptance be refused, it is dishonored, and notice must be given.

The absence from his home of the drawee of a bill payable after date when the holder of a bill or his agent call with it for acceptance, is not

a refusal to accept. But such absence, when the bill is due, is a refusal to pay, and authorize a protest.—*Ibid*, 35.

In a suit instituted by the holder of a bill against the bank for negligence, in relation to demand or notice of non-payment of the bill, the court, although required, are not bound to declare the law as between the holder and the drawer.—*Ibid*, 36.

The bank was the agent of the holder, and not of the drawer, and might consequently so act, as to discharge the drawer, without becoming liable to his principal.—*Ibid*, 36.

10. May not a stranger to the drawer and endorser of a non-accepted bill of exchange intervene *supra protest*, to pay the same to the honor of an endorser or drawer?

He may.—*Konig v. Bayard et al.*, 262.

It is no objection to this intervention, that it has been done at the request and under the guarantee, of the drawees of the bill; who had refused to accept or pay the same.—*Ibid*.

The arrangements made by the payer of the dishonored bill, with the drawee, by which he was to be protected from loss, do not affect the liability of the party to the bill for whose honor it has been paid.—*Ibid*, 262.

If A, at the request of the drawee of a bill of exchange, and under his guarantee, accept and pay the bill, *supra protest*, for the honor of the endorser, the party against whom suit is brought for the amount paid, may avail himself of every evidence which he could have had, if the bill had been paid *supra protest* for the honor of the endorser, by the drawee, and suit brought for the same.—*Ibid*, 262.

The court confirms the principle established in the case of *Coolidge v. Payson*, 2 *Wheat*. 75, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the latter, a virtual acceptance, binding the person who makes the promise.—*Schimmelpennich et al. v. Bayard et al.*, 283.

11. Has not a merchant a right, by the usage of trade, to draw on effects placed in the hands of the drawee, by shipment?

He has; and the consignee must pay the bills, if the shipment places funds in his hands.—*Ib*. 388.

If the drawees of a bill of exchange, who refuse to honor the bill, and thus deny the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill, by a wrongful act. They can acquire no right as the holders of the bill paid *supra protest*, if they were bound to honor it in the character of drawees.—*Schimmelpennich v. Bayard et al.*, 1 *Peters' S. C. Rep.* 285.

A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper to the consignee of

the property, and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill ; but directions were given to charge the bill, generally, to the account of the shipper. Held that the drawees were not bound to accept or pay in consequence of the proceeds of the shipment being received by them.—*Ibid*, 286.

12. Is it necessary that bills of exchange, payable at a given time after date, should be presented for acceptance at all ?

It is not, and payment may at once be demanded, at their maturity.—*Townsley v. Sumrall, Ibid*, 178.

It is admitted, that in respect to foreign bills of exchange, the notarial certificate of protest is sufficient proof, of itself, of the dishonor of a bill, without any auxiliary evidence.—*Ibid*, 179.

It is not disputed, that by the general custom of merchants in the United States, bills of exchange drawn in one state on another state, are, if dishonored, protested by a notary ; and the production of such protest is the customary document of dishonor.—*Ibid*, 180.

If a person undertake to accept a bill, in consideration that another will purchase another bill already drawn, or to be thereafter drawn, and as an inducement to the purchaser to take it ; and the bill is purchased upon the credit of such promise, for a sufficient consideration, such promise to accept is binding on the party.

It is an original promise to the purchaser, not merely a promise for the debt of another ; and having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him.—*Ibid*, 181.

13. Can it make any difference in law, whether the debt for which a bill of exchange is taken, is a pre-existing debt, or money then paid for the bill ?

None at all.—*Townsley v. Sumrall, Ibid*, 182.

14. Is it not a well-settled rule, that if a bill of exchange be drawn by one partner, in the name of the firm, or, if a bill be drawn on the firm by their usual name and style, be accepted by one of the partners, that all the partnership are bound ?

It is.—*Le Roy v. Johnson, Ibid*, 197.

15. What is the general rule as to what amounts to due diligence in the holders of promissory notes, in order to charge the endorsers ?

It is difficult to lay down any universal rule on the subject. Many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule.—*Bank of U. S. v. Carneal, 2 Peters' Rep.* 551.

Where the parties reside in the same city or town, the notice should be given at the dwelling-house, or place of business, and the duty of the holder does not require him to give notice at any other place.—*Williams v. Bank of U. S., Ibid*, 102.

If notice of the non-payment of a note, although left at an improper place, was nevertheless, in point of fact, received in due time by the endorser, and so proved, or could, from the evidence in the cause, be properly presumed by the jury, it is sufficient, in point of law, to charge the endorser.—*Bank of U. S. v. Corcoran, Ibid, 132.*

The law of Kentucky is settled, as it is in Virginia, and in this court, that upon Virginia contracts, by endorsements of promissory notes, every reasonable effort must be made to recover of the drawer, by suit, before the assignee can have recourse against the assignor or endorser.—*Bank of U. S. v. Weisiger, Ibid, 347.*

A power to draw bills of exchange upon a house in good credit, and to throw those bills upon the market, is equivalent to a deposit of cash in the vaults of the agent.—3 *Peters' S. C. Rep.* 428.

Of the general power to protest the bills of one (in this case, a factor, with a balance in his hands) who has overdrawn, there can be no question, for it is the only security which one who gives a power to draw bills, and throw them on the market, or perhaps to draw at all, has against the bad faith of his correspondent. On this subject, he takes the risk of paying the damages, if in fault, or of throwing them on the other, if he has actually abused his trust.—*Ibid, 429.*

The currency which a merchant may give to bills drawn on him by a correspondent, by payment of such bills, does not deprive him of the security he has a right to, by refusing his acceptance of other bills so drawn.—*Ibid, 430.*

An action was brought by the Union Bank of Georgetown against George B. Magruder, as endorser of a promissory note drawn by George Magruder. The maker of the note died before it became payable, and letters of administration to his estate were taken out by the endorser. No notice of the non-payment of the note was given to the endorser, or any demand of payment made, until the institution of the suit. Held that the endorser was discharged, and his having become the administrator of the drawer does not relieve the holder from the obligation to demand payment of the note, and to give notice thereof to the endorser.—*Magruder v. Union Bank of Georgetown, 3 Ibid, 90.*

In this case, the note was drawn Nov. 8th, 1817, payable seven years after date. The maker died 18th November, 1822; administration was taken out by the defendant on the 18th November, 1823. The note became due 11th November, 1824. In delivering the opinion of the court, the C. J. makes the following observations. This suit is not brought against George B. Magruder, as administrator of George Magruder, the maker of the note, but against him, as endorser. These two characters are as entirely distinct as if the persons had been different. A recovery against George B. Magruder, as endorser, will not affect assets in his hands, as administrator. The fact that the endorser is the representative of the maker, does not oppose any obstacle to proceeding in regular course.

The endorser of a promissory note, who received no value for his endorsement from a subsequent endorser, or from the drawer, cannot set up the want of consideration received by himself; because money paid

by the promisee to another is as valid as if paid to the promissor himself. *McDonald v. Magruder, Ibid, 476.*

16. Can a person bind himself by letter to accept a bill ?

He may. The rule was laid down on this subject with great precision by this court in the case of *Coolidge v. Payson, 2 Wheat. 75*, after much consideration, and a careful review of the authorities ; that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding on the person who makes the promise. —*Boyce & Henry v. Edwards, 4 Ibid, 12.*

Whenever the holder of a bill seeks to charge the drawee as acceptor, upon some occasional or implied undertaking, he must bring himself within the spirit of the rule laid down in *Coolidge v. Payson, Ibid.*

The rule laid down in *Coolidge v. Payson*, requires the authority to be pointed at the specific bill or bills, to which it is intended to be applied, in order that the party may not be mistaken in its application.—*Ibid.*

17. What is the general principle as to the duty of the holder of a promissory note, in order to charge the endorser ?

That he must pursue with legal diligence all his means and remedies, direct, immediate or collateral, to recover the amount of his debt of the drawer, or any one else who has put himself, or by operation of law has been put in his place.—*Bank of the United States v. Taylor, 4 Peters' S. C. Rep. 366.*

In the above case, after judgment obtained in the Circuit Court of the United States against the drawer of a note, a *capias ad satisfaciendum* was issued against him by the holder, and he was put in prison. Two justices of the peace ordered his discharge, claiming to proceed according to the law of Kentucky in the case of insolvent debtors ; and the jailer permitted him to leave the prison. Held, the neglect of the holder of the note to proceed against the jailer and his securities, prevents his making the endorser liable for the amount of the note. It may be observed, that this was decided under the statute law of Kentucky, which enjoins extraordinary diligence upon the holders of negotiable paper in order to charge endorsers.

18. Is it not a well settled principle, that no man who is a party to a negotiable instrument, shall be permitted by his own testimony to invalidate it ?

It is. Having given it the sanction of his name, and thereby adding to the value of the instrument by giving it currency, he shall not be permitted to testify that the note was given for a gambling consideration which would destroy its validity.—*Bank of the United States v. Dunn, 6 Ibid, 51.*

A suit was instituted by the bank against Pearson, the drawer of a bill of exchange endorsed by Hatch, which suit stood for trial at the ap-

proaching term. The attorney and agent of the bank agreed with Pearson, that the suit against him should be continued without judgment, if Pearson would permit a person in confinement under an execution at his suit, to attend a distant court as a witness for the bank, in a suit in which the bank was plaintiff. The witness was permitted to attend the court, and the suit against Pearson was continued agreeably to the agreement. By the court: this was an agreement for a valuable consideration, and not a mere voluntary and discretionary exercise of authority on the part of the agent of the bank. It was a virtual discharge of the endorser of the bill.—*Bank of the United States v. Hatch*, 7 *Ibid*, 250.

In the case of the *Bank of the United States v. Dunn*, 6 *Peters*, 51, this court decided that a subsequent endorser was not competent to prove facts which would tend to discharge the prior endorser from the responsibility of his endorsement. By the same rule, the drawer of a note is equally incompetent to prove facts which tend to discharge the endorser.—*Bank of the Metropolis v. Jones*, 8 *Ibid*, 12.

The officers of the bank have no authority, as agents of the bank, to bind it by assurances which would release the parties to a note from their obligations. The principles of the case of the *Bank of the United States v. Dunn*, 6 *Peters*, 51.—Affirmed.

19. Does not an endorsement, in blank, on a promissory note, authorize the filling it up, either before or after action brought, with the name of the party for whose use the suit may be brought?

It does; and if the holder, though the endorsee, is a citizen of another state, he may sue on the note in the courts of the United States, although the drawer and drawee of the note were citizens of the same state and not of the state of which the plaintiff is a citizen.—*Evans v. Gee*, 11 *Ibid*, 80.

20. May not a suit be brought against the drawer and endorser of a bill of exchange on its non-acceptance?

It may.—*Ibid*.

21. Is not a bill of exchange drawn in one state of the United States, on a person in another state, and payable there, a foreign bill?

It is.—*The Bank of the United States v. Daniels*, 12 *Ibid*, 32.

Where a bill was drawn in Kentucky on a person in Kentucky, and accepted, payable in New Orleans, the acceptor is liable on the contract to the same extent as he would have been if he had accepted the bill in Louisiana.

As a foreign bill, the holders are entitled to re-exchange, by commercial usage, when the protest for non-payment was made.—*Ibid*.

22. Does giving a note for a pre-existing debt, discharge the original cause of action?

It does not; unless it is agreed that the note shall be taken in payment.—*Ibid*.

23. May not a party to a note entitled to notice, waive the notice by a promise to see it paid?

He may; or by an acknowledgment that it must be paid; or a promise that "he will set the matter to rights;" or by a qualified promise, having knowledge of the laches of the holder.—*Reynolds et al. v. Douglas et al. Ibid.*, 497.

24. Can a person who takes a bill of exchange, which on the face of it was dishonored, be allowed to claim the privileges which belong to a *bona fide* holder without notice?

He cannot.—*Andrews v. Pond et al.*, 13 *Ibid.*, 65.

The acceptor of a bill of exchange stands in the same relation to the holder, as the maker of a note does to the payee; and the acceptor is the principal debtor in the case of a bill precisely like the maker of a note.—*Ibid.*

The liability of the acceptor grows out of, and is to be governed by, the terms of his acceptance; and the place of payment can be of no more importance in the one case than in the other.—*Wallace v. M'Connel, Ibid.*, 136.

The plaintiffs in an action on a foreign bill of exchange which was protested for non-acceptance, with the protest thereunto attached, can recover without producing the first of the same set, or accounting for its non-production.—*Downes v. Church, Ibid.*, 205.

LOUISIANA DECISIONS.

1. Is not a bank note recoverable where the names of the president and cashier are either worn or torn off?

It is:—*Miner v. The Bank of Louisiana*, 1 *Martin's Louisiana Reports*, 12.

By the court: it is in evidence that a number of notes of the amount, tenor and date of that which is the subject of this suit, were put afloat by the bank—that the parts of the note which remain are genuine, and we are to infer that the remainder which is destroyed was equally so, unless we suppose that which cannot be presumed, that the clerks of the bank have contrived to defraud the corporation.—*Judgment for plaintiffs.*

2. May not the consideration of a note be inquired into?

It may.—*Brown v. Fort & Giraud, Ibid.*, 34.

3. Does not the Spanish law give a joint suit against the maker and endorser?

It does.—*Peretz v. Peretz et al., Ibid.*, 219.

4. Does not a vender who sells for a note, retain his lien in case of bankruptcy?

He does ; but loses it if the goods sold be altered, as wine by mixture.—*Stackhouse et al. v. Foley's Syndics, Ibid, 228.*

5. Are not notes deposited in the bank for collection, a special deposit ?

They are ; and as such, the defendants cannot oppose any set-off or compensation against the depositor's demand for them.—*Syndics of Ame- lung v. Bank of the United States, Ibid, 322.*

6. Can evidence be admitted of a promise to pay interest if no mention is made of it in the note ?

It cannot.—*Toussaint v. Delogny, 2 Ibid, 78.*

7. Can the signature to a promissory note be proved by the report of experts ?

It can. Appeal bond a good piece of comparison.—*Sauve v. Dawson, 2 Ibid, 202.*

8. Will not a check received from a person who obtained it unfairly entitle the party to recover on it ?

It will ; if he took it without knowledge of the circumstances under which he first took it.—*Clark v. Stackhouse, 2 Ibid, 319.*

9. May not parol evidence be received that a person not named as payee in a bill of exchange, furnished the value and is interested therein ?

It may.—*Grieve's Syndics v. Sagory, 2 Ibid, 599.*

10. Can the holder of a bill recover against the acceptor without proving the hand-writing of the endorser ?

By the court : the acceptor is bound to know the hand-writing of his correspondent, the drawer ; yet he is supposed to look no further, and an endorser who sues is obliged to make out his right and authority to recover, in the same manner as if the bill had been endorsed after acceptance.—*Michell v. Ayme, 3 Ibid, 647.*

11. In a suit between an endorser and an endorsee, may not the maker of the note be a witness ?

He may,—*Alat v. Dolirole, 3 Ibid, 657.*

12. If A buys goods for B, giving his own note, and draws on B, who pays the draft, can the goods, on the failure of A, be arrested in the hands of another agent of B for the debt of A ?

They cannot.—*Emmerson v. Gray & Taylor, 3 Ibid, 697.*

13. Does not the protest of a bill of exchange prove itself ?

It does.—*Caune v. Sagory, 4 Ibid.*

14. Is it necessary that a bill from a quartermaster-general on the secretary of the United States, should be protested for non-acceptance?

It is not.—*Baker v. Montgomery et al.*, 4 *Ibid*, 90.

15. When must notice of protest be given?

Within a reasonable time; and what that reasonable time ought to be, is a question of fact, which must depend upon the circumstances of each case.—1 *Dallas*, 254, 270. 2 *Id.* 158, 192. *Pindar v. Nathan, et al.*, 4 *Ibid*, 346.

16. If A requests B to purchase bills, and B procures them on his own credit from C, and delivers them to A, who credits him therewith; on the failure of B, will C have an action against A?

He will not, if there be no fraud or collusion on his part.—*Amory et al. v. Grieve's Syndics*, 4 *Ibid*, 632.

17. What is the presumption if a man put his name on the back of a note not negotiable?

The presumption is, that he meant thereby to become surety for the payor.

In such a case, his liability does not depend on the fulfilment of the formalities by which the endorser of a negotiable paper becomes liable, and the payor may recover from such a surety, although he may have neglected to sue the principal debtor, or through negligence suffered some advantage to be lost, whereby the surety is placed in a worse situation.—*Cooley v. Lawrence*, 4 *Ibid*, 639.

18. May not the holder of a negotiable note, endorsed in blank, sue thereon?

He may.—*Allard v. Ganushan*, 4 *Ibid*, 662.

19. Is not a power to fill up a blank check personal?

It is; and will not descend to one's representatives.

The acknowledgment of one on his death-bed, that money which he had deposited in bank in his own name, belonged to another, enables that other to maintain an action for it.—*Musson v. Bank of the United States*, 4 *Ibid*, 707.

20. On the failure of a debtor, may not his note, though not yet payable, be put in suit, &c.?

It may; till there is a stay of proceedings, any creditor may sue or attach.—*Civil Code*, 276, art. 88. If goods are assigned, proof of tradition is necessary.—*Fisk v. Chandler*, 7 *Ibid*, 24.

21. On what day must a note payable "on the first of May next fixed," be paid?

It must be paid on that day, and no days of grace are allowed on it.
—*Durnford v. Patterson et al.*, 7 *Ibid*, 460.

22. If a bank neglect to present a bill in due time, which is left for collection, is not the bank responsible?

It is.—*Ibid*.

23. May not suit be brought, on a note not negotiable, in the name of the payee, for the use of the transferee?

It may.—*Filhiol v. Jones et al.*, 8 *Ibid*, 635.

24. Can the maker of a note against a fair endorsee, avail himself of an equity which would have destroyed the claim of the original payee?

He cannot.—*Hubbard et al. v. Fulton's Heirs*, 9 *Ibid*, 86.

25. Is not possession *prima facie* evidence of property in a bank note?

It is.—*Louisiana Bank v. The United States Bank*, 9 *Ibid*, 392.

26. If an endorser, ignorant that no demand was made of the maker, promises to pay, will he be bound thereby?

He will not.—*Bazzi v. Rose and her Child*.

27. May not it be lawfully stipulated, that in case a note be not paid at maturity, it shall bear ten per cent. from its date?

It may.—*Lauderdale v. Gardner*, 8 *Ibid*, 716.

28. May not the maker of a note prove its execution?

He may. Parol evidence of a written notice of the protest of a note to the endorser may be received, although no call was made on him to produce it.

A blank endorsement gives a right of action to the holder of a note.
—*Abat v. Rion*, 9 *Ibid*, 465.

29. May not an endorser be a witness to prove an alteration in the note made *after* his endorsement?

He may.—*Shamburgh v. Commagere et al.*, 10 *Ibid*, 18.

30. Of what does the question of a reasonable notice to the endorser partake?

It partakes both of law and fact. It depends on facts, such as the distance at which the parties live from each other, the course of the posts, &c. &c. But when those facts are established, reasonableness of time becomes a question of law.—*Spencer v. Sterling*, 10 *Ibid*, 88.

31. If the endorser was sued on the protest for non-acceptance, in order

to compel to give security, and afterwards on the protest for non-payment, and there is judgment on the latter suit, can the endorser be condemned to pay costs on the first case, after payment of the judgment in the second?

He cannot.—*Bolton et al. v. Harrod et al.*, 10 *Ibid*, 115.

32. Will payment of a note to a person who has not at the time the possession of the note, or any authority to receive its amount, avail the debtor?

It will not; although the other afterwards receive the note from its holder with authority to collect it.—*Welsh v. Brown*, 10 *Ibid*, 310.

33. Where the maker of a note, dated at New Orleans, resides in another state, is it not sufficient to demand payment at the place of date?

It is.—*Hepburn v. Toledano*, 10 *Ibid*, 64.

34. Can a note neither proved to have the signature of the president or cashier, nor acknowledged by them, be laid before *experts* as a ground of comparison?

It cannot. Evidence of the engraving was proper to go to the jury, though not conclusive.—*Conrad v. Louisiana Bank*, 10 *Ibid*, 700.

35. When must notice of non-payment be given?

On the day which follows the protest.—*Canonge v. Cauchoise*, 11 *Ibid*, 452.

36. Is a wife bound by a note, on which the name of her husband is written above hers?

Not where his signature is denied and not proved. Nor is she bound by a note executed jointly with her husband.—*Lombard v. Gillet & Wife*, 11 *Ibid*, 453.

37. Is not strict proof required of the authority given to a third person to receive notice, in behalf of an endorser?

It is.—*Montillet v. Duncan*, 11 *Ibid*, 534.

38. Can the endorsee of a promissory note or bill of exchange, write over a blank endorsement, an obligation which will discharge from the necessity of due diligence in making demand and giving notice?

He cannot. It is not sufficient to excuse want of notice, that the endorser was not injured by the neglect. The endorsee, who receives a note after it is due, is obliged to demand payment and give notice within the same delay as if the payor were negotiable.—*Hill v. Martin*, 12 *Ibid*, 176.

39. May not a party sued on a note be required to answer on oath whether he did not subscribe, and the payee endorse it?

He may, and on refusal the facts will be taken for confessed. The civil code recognizes one instance only, in which the party may refuse to answer: i. e. when he might thereby arraign himself of a crime.—*Civil Code*, 316, 261. *Bullett v. Serpentine*, 12 *Ibid*, 393.

40. Is a note payable in sugar negotiable?

It is not. If one bind himself to deliver sugar on a day fixed, and fail, he is liable to damages in money.—*Pepper v. Peytavin*, 12 *Ibid*, 671.

41. Is the oath of the notary of his regular habit of giving notices on protested bills, and his presumption that he did so in a certain case, sufficient proof of notice to an endorser?

It is not.—*Hoff v. Baldwin*, 12 *Ibid*, 699.

42. Can parol evidence be received to prove that a note which is expressed to be paid in dollars, was to be discharged in bank notes of the Bank of Kentucky?

It cannot.—*Veche v. Grayson*, 1 *New Series Martin's Louisiana Reports*, 133.

43. On whom does the burden of proof of the time of endorsement rest, when the maker of a note is sued, and relies on payment before endorsement, or any other legal defence?

It rests on the maker.—*Canfield v. Gibson*, 1 *N. S.*, 143. 1 *Johns. Rep.* 319. 5 *Mass. Rep.* 334.

44. Is an endorsee, without notice, affected by any equity between the original parties?

He is not.—*Thompson v. Gibson*, 1 *N. S.* 150. See *Hubbard et al. v. Fulton's Heirs*, 7 *Martin*, 241.

45. Can the drawer of a bill of exchange recover against the acceptor, without proving that the interest of the payee is vested in him?

He cannot; and the circumstance of the endorsement being stricken out does not furnish proof of this fact.—*Thompson v. Flower et al.*, 1 *N. S.* 301.

46. Is notice to an endorser who resides forty or fifty miles from Natchez, and within a mile or two of the post-office, kept at Pinkneyville, in Mississippi, good if directed to Natchez, where the note was dated?

It is not; there being no proof of diligence used, or inquiry made by the holders to find out the residence of the endorser.—*M'Lanahan et al. v. Brandon*, 1 *N. S.* 322. 12 *Martin*, 181.

47. If the creditor gives a receipt for a note in *payment* of his account, does not this create a novation of the debt?

It does.—*Barron et al. v. Howe*, 2 N. S. 144.

48. Is not the endorser of a note (given for the purchase of a slave, by the maker) by the payment subrogated to the vendor's rights?

He is, and may demand the rescission of the sale.—*Jorregan v. Segura's Syndic*, 2 N. S. 158.

49. If notes are placed in a man's hands for collection, and to secure him for advances made, and to be made, may he not resist a demand of them, till he be indemnified?

He may.—*King's Curator v. Osborne et al.*, 2 N. S. 247.

50. Can the payee of a note, who has endorsed it, maintain any action on it?

He cannot, even for the use of his endorsee.—*Moore v. Maxwell et al.*, 2 N. S. 249.

51. Can payment of a note or bill, *supra protest*, be made before protest?

It cannot. If payment be made before, and the note is afterwards protested, the endorser is not liable.—*Holland v. Pierce*, 2 N. S. 499.

52. Where must payment be demanded, if the maker of a note cannot be found?

At his domicil, if in the state.—*Louisiana State Insurance Company v. Shawburgh*, 2 N. S. 511.

53. Is not notice of protest necessary to charge the drawer of a bill of exchange, although it may have been given in discharge of a precedent debt?

It is; and that, whether the parties are merchants or not.

A promise to pay the bill, if duly protested, is not a promise to pay if it be afterwards protested.—*Penn v. Pumeirat*, 2 N. S. 541.

54. In the description of a note, in pleading, is not an error in the fractional part fatal?

It is.—*Pilie v. Mollere*, N. S. 666.

55. The endorser's residence being only at six miles distance—Held, that three or four days are too great a delay in giving him notice.—*Hill v. Martin*, 12 *Martin*, 177.

56. Can the endorser make the payee a party, and propound interrogatories to him, to attack the consideration?

He cannot.—*Compton et al. v. Patterson*, 3 N. S. 164.

57. If a bill of exchange be given in payment of a precedent debt, is not the drawer responsible, if it return dishonored ?

He is.—*Turner v. Hickey*, 3 N. S. 256.

58. Does not the presumption, which arises from a bill being drawn in the usual form, that it was intended it might be negotiated, yield to testimony to the contrary ?

It does.—*Robertson v. Nott*, 3 N. S. 268.

59. If the note be regularly endorsed, can the defendant put the plaintiff on the proof of his right to it ?

He cannot, unless there is an allegation that the plaintiff did not come by it *bona fide*.—*Banks v. Eastin*, 3 N. S. 291.

60. Does not an endorsement in blank make the note payable to bearer ?

It does.—*Banks v. Eastin*, 3 N. S. 291.

61. If a note alleged to have been lost, is admitted to have been executed, and it was proved it was protested, and afterwards returned to the plaintiff, so that an endorsee would acquire it, subject to all the equity that might be opposed to the plaintiff, will he be compelled to give surety ?

He will not.—*Brent v. Erwin*, 3 N. S. 303.

62. Can the bank contest the right of the person, who lodged a note with them, to it ?

It cannot. The bank may be sued for neglect in protesting the note, and giving notice, before the holder proceeds against his endorser.

The record of a suit against Chauchois, one of the endorsees, who succeeded in avoiding payment on the ground of want of due notice of protest, was received in evidence, as in the case of *Montillet v. The Bank of the United States*, 10 *Martin*, 365. 9 *Ibid*, 379. *Canonge v. Louisiana State Bank*, 3 N. S. 344.

63. Where a note is made payable at a particular place, must not payment be demanded there, before recovery can be had of the maker ?

It must. But a failure to demand, on the day the note falls due, will not discharge him, though it may the endorser.

The place of payment is *accidental* to the contract, not of the essence of it.—*Mellon v. Croghan*, 3 N. S. 423.

64. Will not an agreement by the endorsee of a note, to receive in payment pickets, at a fixed price, on a distant day after protest and notice, liberate the endorser ?

It will.—*Millaudon v. Arnous et al.*, 3 N. S. 597.

65. Is a bank relieved from the obligation of due diligence, in the case of a note received to be collected, by the removal of the maker's domicile out of the city ?

It is not.—*Louisiana State Insurance Company v. Louisiana State Bank*, 3 N. S. 610.

66. Does a petition against the drawer of a bill, which does not set out demand and notice, set forth any cause of action ?

It does not ; and if judgment be given on it, it would be arrested.—*Barbarin v. Descahant's Heirs*, 3 N. S. 639.

67. Has a surety on a note the same liability with an endorser ?

He has not.—See *Cooley v. Lawrence*, 4 *Martin*, 639. *Guidrey v. Vives*, 3 N. S. 659.

68. Must not the endorsee of a note, after its maturity, allow any equitable defence to the maker ?

He must.—*Turcas v. Rogers*, 3 N. S. 699.

69. If a note sued upon, as lost, is admitted by the defendant to have existed, and not pretended to have been paid, will not presumptive evidence of its loss suffice ?

It will ; but the plaintiff will be made to give security for the defendant's indemnification.—*Lewis v. Peytavin*, 4 N. S. 4.

70. If a note be made payable at the house of maker, is not a demand at his dwelling, or his office (place of business), good ?

It is. It is enough that the person to whom the holder means to resort for payment has legal notice.—*State Bank v. Hennen*, 4 N. S. 226.

71. Is not a note made in another state governed by the laws of that state ?

It is ; although endorsed to a citizen of this.

Under a plea of error, evidence may be given that an account which the maker had against the payee, was omitted in the settlement, on which the note was given.

If a tutor take a note in his own name for money due to the minor, a debt due by the tutor, in his own name, may be offered as a defence to it.—*Ory v. Winter*, 4 N. S. 277.

72. Has the acceptor of a bill of exchange a right to go into the consideration between the drawer and drawee ?

He has not.—*Debuys & Longer v. Johnson*, 4 N. S. 286.

73. Is not possession of a note *prima facie* evidence of title to it ?

It is ; but not evidence that the possessor is acting for a third party
—*Parkham v. Murphee*, 4 N. S. 355.

74. Does not a note received for a precedent debt, operate a novation ?

It does ; if after receiving it, due diligence is not used to collect it, and notify the endorser.—*Marburg v. Canfield*, 4 N. S. 539.

75. May not parol evidence be given of the payment of a note of defendants, without producing it ?

It may.—*Berthoud v. Barbaroux*, 4 N. S. 543.

76. May not the attorney in fact to whom the plaintiff had endorsed a note for collection be permitted to strike out the endorsement at the trial ?

He may.—*Berry v. Garbleau & Wife*, 5 N. S. 14.

77. Is a wife bound by a note executed jointly and severally with her husband, on a contract which did not turn to her advantage ?

She is not.—*Ibid.*

78. If the endorser of a note plead the general issue, want of notice of fraud, has his counsel the right of opening the case to the jury ?

He has not.—*Abat v. Sigura*, 5 N. S. 73.

79. Is the post-office a place of deposit for notice of protest ?

It is not, but the mail may be used as a means of their conveyance.

The offer of an endorser to endorse a note for the same sum, is not a waiver of notice.—*Laporte v. Landry*, 5 N. S. 559.

80. When a note is payable to the wife, can the husband transfer her right ?

He cannot ; nor bring or defend a suit respecting it, without her authorization.—*Sterling v. Johnston & Wife*, 5 N. S. 362.

81. Is it necessary that the endorsee should give notice to the maker, of the transfer of the note on which suit is brought ?

It is not.—*Dicks et al. v. Barton*, 5 N. S. 657.

82. Does not a note payable to A B as administrator, authorize a suit by the payee in his own name ?

It does.—*Gilman v. Horseley*, 5 N. S. 661.

83. Are not notes taken up with the endorser's name in them *prima facie* evidence of payment by the maker ?

They are.—*Miller v. Reynolds et al.*, 5 N. S. 665.

84. If a transfer be written on the back of a note, but not signed, and the note remains in the payer's hands, how must the transfer be considered?

It must be considered as inchoate.—*Ramsey v. Livingston*, 6 N. S. 15.

85. Is not a bill at sixty days' sight, accepted payable sixty-three days from the date of the acceptance, accepted according to its tenor?

It is; and is to be protested on the sixty-third day.—*Kenner et al. v. Their Creditors*, 7 N. S. 541.

If on a comparison of the day of acceptance, the day designated for payment, and the tenor of the bill, it appears that the days of grace were included with those of sight, between the day of acceptance and that designated for payment; that day is the peremptory one of payment, and protest on it is legal.—*Ibid*, 36.

86. Should not the notary's certificate state in what post-office he put the notice?

It should.—*Pritchard v. Hamilton*, 6 N. S. 456.

87. Is a note given by one partner to the other, by reason of his surrendering up to him the merchandise which remained unsold, without consideration to the payee?

It is not.—*Corkery v. Boyle*, 8 N. S. 130.

Where the endorser lives within three miles of the post-office, notice put there is not sufficient.—*Louisiana State Bank v. Rowel et al.*, 6 N. S. 506.

88. Is not the endorser of an accommodation note merely a surety?

He is; and can recover no more than he has paid.—*Nolte et al. v. Their Creditors*, 7 N. S. 9.

A party who endorses a bill for the accommodation of the drawer, is not entitled to receive damages from the latter beyond what he has actually paid.—*Dorsey et al. v. Their Creditors*, 7 N. S. 498.

The holder of a note, who discharges or grants a respite to the payee, thereby releases other parties.—*Nolte et al. v. Their Creditors*, 7 N. S. 9.

89. Is the repossession of a note once specially transferred by the endorser, evidence of title?

It is not; but it is if the transfer was in blank.—*Sprigg v. Cuny's Heirs*, 7 N. S. 253.

If the acceptance be not dated, parol evidence is admissible to show on what day it was made.—*Kenner et al. v. Their Creditors*, 8 N. S. 36.

90. When a man gives two endorsers, is not the first liable to the second and subsequent endorsers?

He is.—*Stone et al. v. Vincent*, 6 N. S. 517.

When the consideration of a note to bearer and the right of the holder are put at issue, he must show he came by it *bona fide*.—*Bowen v. Viet*, 6 N. S. 565.

The names of the endorsers make no part of the bill, unless they are necessary to trace a title to it in the plaintiff. Those which are subsequent to plaintiff need not be set out.—*Abat v. Tournillon*, 6 N. S. 648.

The holder of a negotiable note by blank endorsement, may maintain suit on it without filling up the same to himself.—*Gabroch v. Hebert et al*, N. S. 526.

An endorsee of a bill of exchange, who has no interest in the bill, but endorses it to facilitate its discount, is not always to be considered merely as a surety.—*Weir et al. v. Cox*, 7 N. S. 368.

The endorser of a promissory note, with power to make such use and disposition of it as he thinks proper, as long as he remains bound as the payee's surety, is not bound to admit every plea which could be opposed to the payee: such as want of consideration, concealment, or compensation.—*King v. Gayeso, for the use of Stille*, 8 N. S. 370.

BILLS OF CREDIT.

1. What are bills of credit, as prohibited by the constitution of the United States?

Paper issued and intended to circulate through the community for its ordinary purposes, as money; which paper is redeemable at a future day. This is the sense in which the terms have always been understood. In its enlarged, and perhaps literal sense, the term "bill of credit" may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a state binds itself to pay money at a future day, for services actually received, or money borrowed for present use. Nor are instruments executed for such purposes, in common language, denominated "bills of credit."

The constitution considers the emission of bills of credit and the enactment of tender laws as distinct and independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may be emitted if they be not made a tender in payment of debts; is in effect to expunge that distinct, independent prohibition, and to read the clause as if it had been entirely omitted.—*Craig et al. v. State of Missouri*, 4 Peters' S. C. Rep. 431-34.

The definition of a bill of credit, which includes all classes of bills of credit emitted by the colonies, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.—*Briscol et al v. Bank of the Commonwealth of Kentucky*, 11 Peters' S. C. Rep. 258.

A state cannot emit bills of credit, or, in other words, it cannot issue that description of paper, to answer the purposes of currency, which was

denominated before the adoption of the constitution, bills of credit, but a state may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty, and there is no limitation to its exercise by the states, in the constitution, in respect to the incorporation of banks.—*Ibid.*

To constitute a bill of credit within the constitution, it must be issued by a state, on the faith of the state; and designed to circulate as money. It must be a paper which circulates on the credit of the state, and so received and used in the ordinary business of life. The individual or committee who issues it, must have power to bind the state; they must act as agents, and of course, not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit which a state cannot emit.—*Ibid.*

BILLS OF LADING.

Strictly speaking, no person but the consignee, can, by any endorsement on the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere endorsement of the bill of lading, unless he be the consignee, or the goods be delivered to his order; yet by assignment on the bill of lading, or by a separate instrument, he can pass the legal title in the same; and it will be good against all persons except purchasers, for a valuable consideration, without notice, by endorsement on the bill itself. Such an assignment by the owner, passes the legal title against his agents or factors, and creditors, in favor of the assignee.—*Canard v. Atlantic Insurance Company*, 1 *Peters' S. C. Rep.* 445.

BILL OF SALE.

Under the laws of Louisiana, and the decisions of the courts of that state, a mark for the name, to an instrument, by a person who is unable to write his name, is of the same effect as the signature of the name.—*Zacharie & Wife v. Franklin & Wife*, 12 *Peters' S. C. Rep.* 151.

A bill of sale of slaves and furniture, reciting that the full consideration for the property transferred had been received, and which does not contain any stipulations or obligations of the party to whom it is given, is not a *cynalagmatic* contract, under the laws of Louisiana; and the law does not require that such a bill shall have been made in as many originals as there are parties having a direct interest in it, or that it should have been signed by the vendee.—*Ibid.*

BOND.

1. What is a bond?

A bond or obligation is a written instrument, by which the obligor or person bound, obliges himself, his heirs, and personal representatives, to

pay a certain sum of money to another, the obligee, at a day appointed;—2 *Bl. Com.* 340.

2. What three things are essential to a good bond ?

1st. A writing.

2d. A sealing.

3d. A delivery.

Bonds usually contain, first a penalty and then a condition under it, that the penalty shall be void on the payment of certain sums of money, or the performance, or non-performance of certain things.

The most common, are bonds for the payment of money, bonds for indemnity, and bonds for the performance of covenants.

In a bond, the seal is *prima facie* evidence of a consideration, which need not therefore be proved. A bond conditioned to do an illegal act is void.—2 *Bl. Com.* 391.

So also, if it be given on an usurious, or gaining consideration.

A bond, to be good, must be executed by persons able and free to contract.

If executed under duress, or threats, or improper restraints, it is void.

3. If no time for payment is specified, when is a bond payable ?

It is payable on demand.—1 *Brownl.* 53.

4. If no place is mentioned, to whom is it payable ?

It is payable to the obligee in person.—1 *Jac. Law. Dict.* 356.

A bond that one shall not exercise his trade is void, because it is in restraint of trade ; but a bond restraining the obligor from exercising his trade in a particular place, and for a limited time, is good.

The intention of the parties is to be regarded in construing the condition.

5. From what time does a bond take effect ?

From its delivery.—1 *Saund.* 291.

6. By what may a bond be discharged ?

It may be discharged by an act of God ; but cannot be avoided by the act of the obligor himself.

A bond discharges a parol or written promise not under seal ; because it is a security of a higher nature. In the same way also a judgment discharges a bond.

7. What will a sum specified in the condition as the measure of damages to be paid by the party failing in the performance, be considered ?

It will be considered as liquidated damages, and not as penalty.—4 *Wend.* 468.

8. Is a fraudulent representation, inducing the obligor to execute the bond, a defence at law, to an action on the bond ?

It is not.—4 *Wend.* 471.

9. Is a bond executed in blank as to a material part, with parol authority to an agent to fill up the blank and deliver it, valid ?

It is valid.—8 *Cow.* 118.

10. May a bond or other specialty be discharged or released by parol agreement between the parties ?

It may.—7 *Cow.* 48.

11. What if the performance of the condition be prevented by the omission of the obligee ?

In such cases the obligor is discharged.—4 *Cow.* 39.

It is said that there are only three things essentially necessary to the making a good obligation, viz., writing on paper or parchment, sealing, and delivery ; but it hath been adjudged not to be necessary that the obligor should sign or subscribe his name ; and that therefore, if in the obligation the obligor be named Erlin, and he signs his name Erlwin, that this variation is not material, because subscribing is no essential part of the deed, sealing being sufficient.—2 *Co.* 5, *a. Godard's case.* *Noy* 21. 85. *Moor.* 28. *Stile.* 97. 2 *Salk.* 462. 5 *Mod.* 281.

12. Shall a person be charged by a bond, though signed and sealed, without delivery ?

No ; without words or other things amounting to a delivery.—1 *Leon.* 140. But a bond or deed may be delivered by words without any act of delivery ; as where the obligor says to the obligee, go and take the said writing, or take it as my deed, &c. So an actual delivery, without speaking any word, is sufficient ; otherwise, a man that is mute could not deliver a deed.—*Co. Lit.* 36, *a.* *Cro. Eliz.* 835. *Leon.* 193. *Cro. Eliz.* 122.

13. Will interlineation in a bond, make the bond void ?

It will not, if the interlineation be in a place not material, but if it be altered in a part material, it shall be void.—1 *Nels. Abr.* 391. And a bond may be void by erasure, &c., as where the date, &c., is erased after delivery, which goes through the whole.—5 *Rep.* 23. If the words in a bond at the end of a condition, that then this obligation be void, are omitted, the condition will be void, but not the obligation.—*See farther, Bac. Ab. Obligation, (C.)*

14. Is a bond of indemnity against an illegal act void ?

It is.—4 *Cow.* 340.

Neither principal nor surety are liable beyond the penalty of a bond.—3 *Cow.* 151

15. If a sheriff or other officer takes a bond as a reward for doing a thing, is it void ?

It is.—3 *Salk.* 75.

16. If a bond be joint and several, against whom may the obligee proceed ?

He may proceed against all, or each, but he can have but one satisfaction.

17. If a bond be joint, or joint and several, does a release of one obligor, discharge the rest ?

It does.—4 *Saund.* 48. *Co. Lit.* 232. But it is otherwise if the obligee only covenants not to prosecute.

18. If the condition be to do one thing or another at the election of the obligor, and he is discharged from one by the act of God, is he discharged of both ?

He is.—*Eaton's Case*, *Mo.* 357.

19. Will a covenant not to sue one of the several obligors of the bond make it void as to others ?

It will not.—*Dean v. Newhall*, 8 *Term Rep.* 168. 6 *Term Rep.* 239.

20. Can an action be maintained on an administration bond ?

It cannot, until after a judgment against the executor or administrator as such, and a *debastavit* has been established by means of a second suit.—*Gordon's Admrs. v. The Justice of Frederick*. 1 *Murnford's Rep.* 1.

21. Does covenant, (as well as death,) lie on a bond with a collateral condition ?

It does.—*Ward v. Johnson*, *Ibid.* 45.

22. May a co-obligor, in a joint and several bond, (though described as security,) be considered as stipulating for the performance of the condition ?

He may ; the words being, if the above bound L and W his security, shall, &c., then this obligation to be void, &c.—*Ibid.*

A bond being given to make a title to a particular tract of land, to contain a *certain number of acres*, but not binding the obligors to convey any other specific lands to make good a deficiency, the only remedy for such a deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.—*Chinn v. Heale*, *Ibid.* 63.

In debt on a bond, if the defendant crave *oyer*, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond ; and though the plaintiff declare against one of the

several obligors, without stating that they were severally bound, yet if the bond appear to be joint and several, it is sufficient.—*Meredith's Adm'x. v. Duval, ibid, 76.*

23. In an action of debt on a bond, is the judgment always entered for the penalty, to be discharged by the principal and interest?

It is, and if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty.—*Ib.*

24. Is the taking in execution the body of one of two joint obligors, a satisfaction of the debt?

It is not, and does not bar an action against the other obligor.—*Ib.*

25. Is a scroll annexed to a signature sufficient to make a sealed instrument?

It is not, unless it appear from some expression in the body of the instrument that it was intended as such.—*Austin's Adm'x. v. Whitlock's Ex'rs., ibid, 487.*

26. Where several are bound jointly and severally in an obligation, will the tearing off the seal of one, make the bond void as to the others?

Yes. Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleaded, that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon demurrer it was adjudged, that the obligation by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were severally bound.—2 *Lev.* 220. 2 *Show,* 289. *Sed qu.*

27. In the pleading of performance, what must the defendant set forth?

He must set forth in what manner he hath performed it. Thus, in debt on a bond with condition for performance of several things, the defendant pleads that the condition of the said deed was never broken by him, and held an ill plea; because for saving the bond, it is necessary for the defendant to show how he hath performed the condition; and this sort of pleading was never admitted.—2 *Vent.* 156.

28. Wherein does a bond differ from a recognizance?

A bond, is a deed whereby the obligor obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another at a day appointed.

A recognizance, is an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, with condition to do some particular act.—*Black. Com., Book 2, Chap. 20, page 341*

BOTTOMRY.

Of the cases decided in the courts of the United States, on general principles, as to the validity of bottomry bonds; by whom they may be given, by the master, or by the owners; and under what circumstances; and relative to the proceedings upon them; the principal are as follow.

1. With what must a bottomry bond, given to pay a former bottomry bond, stand or fall?

With the first hypothecation; and the subsequent lenders can claim only upon the same ground with the former lenders, of whom they are virtually the assignees.—*The Aurora*, 1 *Wheat.* 96. 2 *Cond. Rep. of Supreme Court United States*, 129.

2. Where money has been advanced under a stipulation for a bottomry bond, and the vessel is permitted to go to sea, without any attempt to enforce the stipulation, is it a waiver of the right?

It is, and the party cannot, on a subsequent voyage, insist upon a bottomry bond for such advances.—*Ibid*, 104.

3. May a *bona fide* creditor, who advances his money to relieve a ship from actual arrest, on account of debts which are a lien upon her, stipulate for a bottomry interest?

He may; and the necessity will justify the master, who has no other sufficient funds or credit, in giving it.—*Ibid*, 105. *Ibid*.

4. To make a bottomry bond a valid hypothecation of the ship, what must a creditor show?

He must show that the advances were necessary to effectuate the objects of the voyage or the safety of the ship.—*The Aurora*, 1 *Wheaton*, 96. *Putnam v. The Polly, Bee*, 157, *Ibid*.

But a mere threat to arrest the ship, for pre-existing debt, would not be a sufficient necessity to justify the master in executing a hypothecation.—*Ibid*.

5. If various demands are mixed up in his bonds, some of which would sustain a hypothecation, and some not, must the creditor so exhibit them to the court?

He must; that they may be separately weighed and considered.—*Ibid*, 107. *Ibid*, 130.

6. A tradesman has a lien on a foreign ship, lying in a port of the United States, for repairs made by him on board; will such lien be preferred, in point of right, to a bottomry interest, which is prior in point of time?

It will, if it appear the repairs were indispensable.—*Ibid.* 2 *Gallis*, 345. *Ibid.*

So also as a consignee is bound to advance the freight due on the cargo, he cannot, whilst possessed of that fund, advance on marine interest to the ship-owner.—1 *Wash. C. C. R.* 49. *Ib.* 130.

Unless under particular circumstances, as, if he receive directions to appropriate the freight to some other object.—*Ibid.*

A consignee, who has funds in his hands, or money to make the repairs can otherwise be raised by him, cannot burthen the consignor with maritime interest.—*Rucker v. Cunningham*, 2 *Adm. Decis.* 295. *Hurry v. The John & Alice*, *Ibid.* 1 *Wash. C. C. R.* 293.

It may well be questioned whether a correspondent, who has been in the habit of making advances, can require or take a bottomry bond, even where he has no funds in his hands.—*Rucker v. Cunningham*, 2 *Adm. Decis.* 295.

7. What must be shown to make a bottomry bond valid ?

The necessity for raising money in this manner must be shown ; and it must appear to have been given for necessities, to enable the vessel to prosecute her voyage. If the master or consignee had other funds, or if the loan was not originally made upon the credit of the vessel, it is not valid.—*Hurry v. The John & Alice*, 1 *Wash. C. C. R.* 293. *Walden v. Chamberlain*, 3 *Wash. C. C. R.* 290. *Boreal v. The Golden Rose*, *Bee*, 131.

8. In suits on bottomry bonds, what must the libellant prove ?

He must always prove, by evidence other than the bond itself, that the money was lent, or repairs made, and materials furnished, to the amount claimed ; that they were necessary to enable the vessel to perform the voyage, or for her safety, or could be obtained in no other manner. He should exhibit an account of items, with the usual proof to support them, that the court may judge of their necessity.—*Crawford v. The William Penn*, 3 *Wash. C. C. R.* 404.

Where a libel is brought on a hypothecation bond, and it is averred to be a hypothecation of the vessel and freight, and the bond itself, a copy of which is annexed to the libel, does not include the freight, the variance is immaterial and will be disregarded.—*Ibid.* See also *Rucker et al. v. Cunningham*, 2 *Peters' Adm. Decis.* 295.

A hypothecation bond must not be diverted from its original use to the purpose of securing engagements, not at first founded, merely on the credit of the ship, but for the advances made on the personal credit of the owners, either voluntarily by their consignee, agent, or friend, or at their request ; nor can it be given as a double security, running along with and in aid of personal responsibility.—*Ibid.*

9. May the master hypothecate vessel and freight, in a foreign port, for advances necessary for repairing and provisioning the vessel ?

He may, if such advance cannot be procured on the credit of the owner.—*Murray et al. v. Lazarus et al.*, 1 *Paine*, 572.

10. May a bottomry bond be good in part and bad in part?

It may, and will be sustained by the court so far as it is good.—*The Packet*, 3 *Mason*, 255.

11. What constitutes the essential difference between a bottomry and a simple loan?

The risk of the lender and his right to repayment only on the safe arrival of the vessel.—*The Mary*, 1 *Paine*, 671.

12. Is marine interest requisite to a bottomry loan?

It is; but if not expressed in the bond, it will be presumed to have been included with the principal.—*Ibid.*

13. When the freight is pledged in a bottomry bond, does it mean the freight of the whole voyage?

It does, and not merely the freight for that part of the voyage unperformed at the giving of the bond.—*The Zephyr*, 3 *Mason*, 341.

In a respondentia bond for ten thousand dollars on goods on board of the brig S. from Boston to St. Petersburg, and back, there was a clause that the brig was to have on board, on both passages, the amount lent, in goods. There was also a memorandum executed at the same time, but not referred to in the bond, that the bills of lading should be endorsed to the lenders as collateral security. The brig was lost upon the return voyage, having goods on board of the value of nine thousand dollars only. The lenders sued the bonds, and claimed payment of the ten thousand dollars, because the full amount of goods was not on board, and because the bills of lading were not endorsed to the lenders. It was held that these acts were not conditions precedent, the omission of which was sufficient to justify a recovery in toto; but the lenders were entitled to recover the difference in amount between the sum lent and the sum on board at the time of the loss.—*Franklin Insurance Company v. Lord*, 4 *Mason*, 248. *Ibid.*, 131.

If the master have sufficient funds of the owner's, or can procure them upon the credit of the owner, he cannot hypothecate the vessel.—*The Aurora*, 1 *Wheat.* 96.

The amount of a bottomry bond, which had been executed by the master abroad, without the knowledge of the insured, a few days before the date of the policy, is to be deducted from the actual value of the property covered, and not from the value as estimated in the policy.—*Watson et al. v. Insurance Company of North America*, 3 *Wash. C. C. R.* 1.

14. Where money has been advanced on the present credit of the mas-

ter or owner, and the vessel had performed a subsequent voyage, can a hypothecation by the master to secure the debt be supported?

It cannot.—*Walden v. Chamberlain*, 3 Wash. C. C. R. 290.

A hypothecation can only be legally made by the actual master. It therefore constitutes a conclusive ground of objection to the validity of such instrument, that the master by whom it was given, had, before the advances were made and the bond given, resigned his command and another master succeeded to it.—*Ibid.*

15. Where the original voyage is broken up abroad, may the captain borrow money upon bottomry to enable him to return home?

He may. The authority to hypothecate extends to any voyage he is authorized to make.—*Crawford et al. v. The William Penn*, 3 Wash. C. C. R. 404.

16. If he has money on board belonging to shippers, is he bound to apply it to the ship's necessities, before borrowing on bottomry?

He is not; at least if not equal to the amount of repairs; but the law invests him with a large discretion on this subject.—*Ibid.*

17. Is the master of a vessel in a foreign port, acting in the character of agent, limited in his power?

He is; and can only pledge the vessel in case of necessity; but the owner having an absolute control over his property, may pledge her to purchase a cargo, and thereby create an admiralty lien.—*The Mary*, 1 *Paine*, 671.

A bottomry bond given by the owner to the master to secure certain advances and wages due him, held valid.—*Miller v. The Rebecca, Bee*, 151.

The owner as well as the master of a vessel may pledge her by bottomry in a foreign port.—*Ibid.*

The admiralty courts of the United States, will entertain jurisdiction *in rem*, to enforce a bottomry bond, executed in a foreign country, between subjects of a foreign country, when the ship is within the territory of the United States.—*The Jerusalem*, 2 *Gallis*, 191.

Where a bottomry bond is given upon a vessel and freight, it binds them only and not the cargo, although in recital in the bond it is stated that the master was necessitated to take the sum loaned on the vessel, her cargo and freight.—*The Zephyr*, 3 *Mason*, 341.

If the libel avers the omission to have been made by mistake, and the fact is made clear by evidence, it will be reformed.—*Ib.*

In a suit *in rem* on a bottomry bond, underwriters to whom an abandonment has been made, but which they have not accepted, are not admissible claimants.—*The Packet*, 3 *Mason*, 255.

Courts of admiralty will marshal the assets in case of bottomry, so as to make the proper priorities in favor of shippers against the property of the master and owners.—*Ibid.*

If the obligee of a bottomry bond suffer the ship to make several voyages without asserting his lien, and executions are levied upon the ship by the other creditors, the obligee loses his lien on the ship.—*Blaine v. The Charles Carteret et al.*, 2 Cond. Rep. Supreme Court U. S. 127.

There is strong reason to contend that the claim or privilege of a bottomry bond shall be preferred to any other, for the voyage on which the bottomry is founded, except seamen's wages.—*Ibid.*

BLOCKADE.

By the treaty with Great Britain, it is agreed that every vessel may be turned away from any blockaded or besieged port or place, which shall have sailed for the same, without knowing of the blockade or siege; but she shall not be detained, nor her cargo, if not *contraband*, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper. The treaty is conceived to be a correct exposition of the law of nations.—*Fitzsimmons v. The Newport Insurance Company*, 2 Cond. Rep. S. C. U. S. 78.

Neither the law of nations, nor the treaty, admits of the condemnation of the neutral vessel for the intention to enter a blockaded port unconnected with any fact. Under the treaty, a second attempt to enter the invested place must be made, after notification of the blockade; and inquiring about the place as if watching for an opportunity to sail into it, or the single circumstance of making immediately for some other port, or possibly obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port. But whether these circumstances, or others, may or may not amount to evidence of the offence, the offence itself is attempting again to enter; and unless "after notice she shall again attempt to enter," the two nations expressly stipulate, she shall not be detained, nor her cargo, if not *contraband*, confiscated.—*Ibid.*

A vessel sailing ignorantly to a blockaded port is not liable to capture under the law of nations.—*Eaton v. Fry*, *Ibid.*, 273. *Maryland Ins. Co. v. Wood*, *Ibid.*, 294.

CARRIERS.

WHO ARE COMMON CARRIERS.

1. Who are, legally speaking, considered carriers, and generally how chargeable?

All persons carrying goods for hire, as masters and owners of ships, lightermen, stage-coachmen, (but not hackney-coachmen in London,) and

the like, come under the denomination of common carriers; and are chargeable on the general custom of the realm for their faults or miscarriages.—1 *Com. Rep.* 25. *Bull N. P.* 70.

All persons undertaking to carry goods for all persons indifferently, for hire, are common carriers.—1 *Salk* 249. *Dwight v. Brewster*, 1 *Pickg. Mass.* 50–53.

2. If a person is at the same time a common carrier, and a forwarding merchant, and he receives goods into his warehouse to be forwarded according to the future orders of the owners; if the goods are lost by fire before such orders are received or the goods are put in transit, is he chargeable as a common carrier?

He is not, but only as a warehouse-man.—1 *Bell's Com.*, § 403, 4th edit. *Roskell v. Waterhouse*, 2 *Stark R.*, 461. *Ackley v. Kellogg*, 8 *Cowen R.* 223, ante, p. 444–449, 451–453. 1 *Bell's Comm.*, 469, 5th ed. *Platt v. Hibbard*, Oct. T. 7 *Cowen's N. Y. Rep.* 497.

3. Is a private person who carries for hire as a casual occupation responsible as carrier?

He is not.—*Satterlee v. Groat*, 1 *Wend. N. Rep.* 272.

But any person undertaking for hire to carry goods for all persons indifferently, is liable as a common carrier.—*Gisbourne v. Hurst*, 1 *Salk* 249. *Bastard v. Bastard*, 2 *Shower*, 81. And no specific agreement is necessary for the price of the carriage.—*Lovett v. Hobbs*, 2 *Showers*, 129. *Morse v. Slue*, 1 *Vent.* 190. Where a coachman commonly carries goods, he is considered as a common carrier.—*Upshire v. Aidie*, *Comyn.* 24.

4. Is not a ferryman liable as a carrier?

He is, and his liability begins when the traveller is directed to proceed.—*Miles v. Johnson*, 1 *M'Cord's S. C. Rep.* 137, 439.

5. Are not owners of vessels carrying for hire on an inland river responsible as common carriers?

They are.—*S. P. Halsay v. Browne*, 3 *Day's R.* 346. *Colt et al v. M'Mechan*, 6 *Johns. N. Y. Rep.* 160. *Richards et al. v. Gilbert et al.*, June T. 1813. 5 *Day's Conn. Rep.* 415.

6. Is the hirer of a vessel owner?

He is not, unless he has the entire control and management of it.—*S. P. Thompson v. Snow*, 4 *Greenl.* 264. *Emery v. Hersey*, 4 *Greenleaf's Maine Rep.* 407.

7. Are not proprietors of stage-wagons, stage-coaches, and railroad cars, which ply between different places and carry goods for hire, common carriers?

They are.—*Beekman v. Shouse*, 5 *Rawle R.* 179. *Gordon v. Little*,

8 *Serg. & Rawle*, 533. *Bac. Abridge, Carriers* A. 1 *Bell's Comm.*, 467, 468, 5th edit. 1 *Bell's Comm.* § 399, 4th edit. *Lovett v. Hobbs*, 2 *Shower R.* 128. *Clarke v. Gray*, 4 *Esp. R. S. C.* 6 *East R.* 564. *Dwight v. Brewster*, 1 *Pick. R.* 50. *Camden and Amboy Railroad Company v. Burke*, 13 *Wend. R.* 611. *Jones on Bailment*, 104, 106. *Garside v. Trent and Mersey Navigation Company*, 4 *T. R.* 389. *Forward v. Pittard*, 1 *T. R.* 27. 2 *Kent's Commentaries, Lect.* 40, p. 598, 599, 3d edit.

So are truckmen, teamsters, cartmen, porters, and the like, who undertake to carry goods for hire, as a common employment, from one town to another, or from one part of a town or city to another.—*Gisbourne v. Hurst*, 1 *Salk. R.* 249. 2 *Kent's Comm. Lect.* 40, p. 598, 599, 3d edit.

8. Are not owners and masters of ships, common carriers?

Yes, they are common carriers by water, whether they are regular packet ships, or carrying smacks, or coasting ships, or other ships carrying on general freight.—1 *Bell's Comm.* 467, 5th edit. 1 *Bell's Comm.* § 399, 4th edit. *Schieffelin v. Harvey*, 6 *John's Rep.* 170. *Elliott v. Russell*, 10 *Johns. Rep.* 1. *Per Holt in Coggs v. Bernard*, 2 *Lord Raymond*, 909. *Hutton v. Osborne*, 1 *Selw. N. P.* 407.

9. Are not the owners and masters of steamboats engaged in the transportation of goods for persons generally for hire, common carriers?

They are.—2 *Kent's Com., Lect.* 40, p. 598, 599, 608, 3d ed. *Hastings v. Pepper*, 11 *Pick. R.* 50. *Jones on Carriers*, 1. *Abbott on Shipp., Pt. 2, Ch. 2, 3, 4.* *Jenks v. Coleman*, 2 *Sumner R.* 221. *Orange County Bank v. Brown*, 9 *Wend. R.* 85. *Crosby v. Fitch*, 12 *Conn. R.* 410. *Camden & Amboy Railroad Com. v. Burke*, 13 *Wend. R.* 611, 627, 628.

10. Are not barge-owners and ferrymen, common carriers?

They are. And so are canal-boatmen, and others employed in the like manner.—1 *Bell's Com.* § 399, 4th ed. 1 *Roll. Abridg. Action sur case, c. pl. 2.* 2 *Kent's Com., Lect.* 40, p. 598, 599, 600, 3d edit. *Bac. Abridg. Carriers, A. Mors v. Slue*, 1 *Mod. R.* 85. 1 *Vent. R.* 190, 238. *T. Raym.* 220. 2 *Lev. R.* 69. *Rich v. Kneeland*, *Cro. Jac.* 330. *Lyons v. Mills*, 5 *East R.* 439. *De Mott v. Laraway*, 14 *Wend. R.* 225. *Allen v. Sewall*, 2 *Wend. R.* 327, 340. *S. S. 6 Wend. R.* 325. 1 *Bell's Com.* 467, 5th edit.

11. Are not owners of steamboats who undertake to tow boats for hire, common carriers?

They are; or if they undertake to tow vessels in or out of port for hire, they are common carriers; but are responsible only for ordinary skill, care and diligence, in their undertaking.—2 *Kent's Com., Lect.* 40, p. 598, 599.

12. Is a person who receives and forwards goods, (commonly called a forwarding merchant,) who takes upon himself the expense of transpor-

tation for which he receives a compensation from the owners, but who has no concern in the vessel or wagons by which they are transported, and no interest in the freight, a common carrier?

He is not; but a mere warehouse-man and agent.—*Roberts v. Turner*, 12 Johns. Rep. 232. *Platt v. Hilliard*, 7 Cowen R. 497. 2 Kent's Com., Lect. 40, p. 591, 3d Edit.

13. Is there any doubt, that adopting the doctrine of the English common law, which declares that persons carrying goods for hire by land or water, including all kinds of internal as well as external navigation, are common carriers, and liable for all losses happening otherwise than by inevitable accident, prevails generally in these United States, as part of the common law of the land?

There is no doubt at all on the subject.—*Gordon v. Buchanan*, 5 Yergerr's Ten. Rep. 71. *Hennan v. Munroe*, 11 Martin's Louis. Rep. 597. *Smith v. Pierce*, 1 Miller's Louis. Rep. 349. *Spencers v. Daggett*, 2 Vermont Rep. 92. *McClure v. Hammond*, 1 Bailey's S. C. Rep. 99. *Miles v. Johnson*, 1 M'Cord's Rep. 157. *Cohen v. Hume*, 1 M'Cord's Rep. 439. *Smith v. Noolan*, 2 Bailey's S. C. Rep. 421. *Murphy v. Staton*, 3 Munf. Rep. 239. *Bell v. Reed*, 4 Binney's Rep. 127. *Moses v. Norris*, 4 N. H. Rep. 304. *Craig v. Childress*, Peck's Tenn. Rep. 270.

14. Does the rule respecting common carriers apply to postmasters in England?

It does not. It has been the settled law in England since the case of *Lane v. Cotton*, that the rule respecting common carriers does not apply to postmasters, and there is no analogy between them. The post-office establishment is a branch of the public police, created by statutes, and the government have the management and control of the whole concern. The postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk and value of the letters under their charge, but only a general compensation from government.—2 Kent, 610, 3d Edit.

15. Has not the rule in respect to carriers by water, established in England, been recognized in several of the states?

It has, in an ample manner, and seems to be generally understood to be the rule in America.—*De Mott v. Laraway*, 14 Wend. R. 225. 2 Kent's Com., Lect. 40, p. 600, 608, 609, 3d Edit. *Clarke v. Richards*, 1 Conn. R. 54. *Williams v. Grant*, 1 Conn. R. 487. *Bell v. Reed*, 4 Binn. R. 127. *Emery v. Henry*, 4 Greenlf. R. 407. *M'Clure v. Hammond*, 1 Bay. R. 99, 101. *Harrington v. Lyles*, 2 Nott & M'Cord, 88. *Hastings v. Pepper*, 11 Pick. R. 41. *Dwight v. Brewster*, 1 Pick. R. 50. *Boyce v. Anderson*, 2 Peters' R. 150, 155.

16. Is not the rule of the common law, with respect to carriers on land,

admitted in its full rigor in the states governed by the jurisprudence of the common law ?

It seems so.—*Beekman v. Shouse*, 5 *Rawle R.* 179. 2 *Kent's Com.*, *Lect.* 40, p. 599, 600, 608, 609, 3d *Edit.* *Gordon v. Little*, 8 *Serg. & Rawle*, 533. *Dwight v. Brewster*, 1 *Pick. R.* 50. *Hastings v. Pepper*, 11 *Pick. R.* 41. Louisiana, in general, has followed the doctrines of the Roman and French law, in her own code.—*Code of Louisiana*, of 1825, *art.* 2722—2728.

17. What is a mere forwarding merchant, who receives goods to forward to order ?

He is but a mere warehouse-man.—*Roberts v. Turner*, 12 *Johns. N. Y. Rep.* 232.

18. Have not sheriffs and jailers been placed, in respect to debtors in custody, under the same responsibility as common carriers ?

They have.—*Elliot v. Duke of Norfolk*, 4 *Term Rep.* 789. *Alsept v. Eyles*, 2 *H. Blacks. Rep.* 108. *Green v. Hern*, 2 *Penn. Rep. by P. & W.* 167. *Ch. J. Gibson*, in this last case, vindicated with great force the stern policy of the rule of the common law, in its application to sheriffs and jailers; the *Code Napoleon* and the *Civil Code of Louisiana* have declared, in the same words, that carriers and watermen were subject to the like obligations and duties as tavern-keepers, and that they were responsible for goods intrusted to them, against loss and damage by theft or otherwise, unless they could show that the loss proceeded from *force majeure*, or uncontrollable events.—*Code Napoleon*, *art.* 1929, 1953, 1954, 1782, 1784. *Civil Code of Louisiana*, *art.* 2722, 2725, 2910, 2939.

OF THE DUTIES AND LIABILITIES OF CARRIERS.

1. Does not the common law rule of the liabilities of carriers, apply with peculiar force to our inland waters ?

It does.—*Cook v. Gourdon*, 2 *Nott & M'Cord's Rep.* 19. *Harring v. Lyles*, 2 *Nott & M'Cord's S. C. Rep.* 88. *S. B. Rutherford v. M'Gowen*, 1 *Nott & M'Cord's Rep.* 17. And whether the loss happened by a peril of the sea or negligence, is a question for the jury.—*Marsh et al. v. Blyth*, 1 *Nott & M'Cord's S. C. Rep.* 170. *S. P. Colt et al. v. M'Mechan*, 6 *Johns. N. Y. Rep.* 160.

2. Has the new code of Louisiana changed the liabilities of steamboat owners ?

None at all.—*Kimbal v. Blanc et al.*, 20 *Mart. Louis. Rep.* p. 386. *S. P. Carrol v. Waters*, 9 *Martin's Rep.* 500.

8. What do common carriers undertake, generally ?

They undertake generally for all people indifferently, to convey goods and deliver them at a place appointed for hire.—*Gisbourne v. Hurst*, 1 *Salk. Rep.* 249. And with or without a special agreement as to price. *Lawrence, J., in Harris v. Packwood*, 3 *Taunt. Rep.* 364.

4. Is not the carrier liable where goods are embezzled, for the value at the port of delivery?

He is.—*Watkinson v. Laughton*, *Aug. T.*, 8 *Johns. N. Y. Rep.* 213.

5. What must there be to render a carrier responsible?

There must be an actual delivery to him, or to his servants, or to some other person authorized to act in his behalf.—1 *Bell's Comm.*, § 397. 4th edit. *Randleson v. Murray*, 8 *Adolph. & Ellis*, 109. 2 *Kent's Com.*, *Lect.* 40, p. 604, 3d edit.

6. Where goods are to be transported by canal, for instance, and a delay is occasioned by the ice, locks breaking, or the like, will a carrier be held liable to damages, on account of delay, or can he be compelled to forward the goods by land, to the place of destination, at his own expense?

Unless there has been a want of due diligence, no action will lie against him for damages, if the goods finally arrive in safety. Nor will he be compelled to forward them by land.—*Parsons v. Hardy*, 14 *Wend. Rep.* 215. *Hand v. Baines*, 4 *Whart. Rep.* 204—210.

7. How is a wrongful delivery of goods treated in common law?

It is treated as a conversion of the property.—*Devereaux v. Barclay*, 12 *Barn. & Ald.* 702. *Stephens v. Elwell*, 4 *Maule & Selw.* 259. *Duffee v. Budd*, 3 *Brod. & Bing.* 177. *Youle v. Harbottle*, *Peake's Rep.* 68.

8. If the goods are sent by a different conveyance from that implied by the undertaking, or in a different manner, and they are lost, will not the carrier be liable for the loss?

He will.—*Sleatt v. Fagg*, 5 *Barn. & Ald.* 342. *Nicholson v. Willan*, 5 *East's Rep.* 507. *Duffee v. Budd*, 3 *Brod. & Bing.* 177. 1 *Roll. Abr.* 2 *C. pl.* 3. *Barnwell v. Hussey*, 1 *Const. Rep.*, *S. Caro.*, 114. *Garnet v. Willan*, 5 *Barn. & Ald.* 53.

9. What if the carrier is told what the value of the goods is, and he is directed to charge what he pleases, and he choose to charge only the ordinary hire?

He waives the notice, and is liable for any damages that may arise.—*Evans v. Soule*, 2 *Maule & Selw.* 1.

10. Is not a carrier liable where he is stalled in a ford, the bridge being impassable?

He is.—*Campbell v. Morse*, 1 *Harper's S. C. Rep.*, p. 468. Held by

the court, Colcock, J., that the defendant was liable, he ought to have ascertained the state of the ford before he entered. If such circumstances were permitted to operate as a relief from liability, then carriers of this description would be always exempted.

11. In respect to goods in a carrier-vessel, which are shipped to be stowed on deck, if they are necessarily thrown overboard, is the carrier exonerated?

He is.—3 *Kent's Com.*, Lect. 47, p. 206, 240, 3d edit. See *Gould v. Oliver*, 4 *Bing. New Cas.* 134. *Crosby v. Fitch*, 12 *Connecticut Rep.* 410, 419, 420. *Lenox v. United Insurance Company*, 3 *Johns. Cas.* 178. *Abbott on Ship.*, p. 3, ch. 8, § 13, 5th edit. *Smith et al. v. Wright*, May T. 1 *Caines' N. Y. Rep.* 43.

But if the goods are improperly placed on deck, and a loss ensues, the carrier is liable.—*Barber v. Bruce*, 3 *Conn. Rep.* 9.

12. If a common carrier receives goods in his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, when does his liability commence as a carrier?

His liability as a carrier begins with the receipt of the goods.—*Forward v. Pittard*, 1 *T. R.* 27.

13. What if an innkeeper is at the same time a carrier, and goods are sent to his inn, and received by him for transportation?

He is liable as a carrier, for any loss, before they are put upon their transit.—*Buller's J.*, *Opinion in Hyde v. Trent and Mersey Navigation Company*, 5 *T. R.* 389. 1 *Bell's Com.*, § 469, 5th edit. 1 *Bell's Com.*, § 403, 4th edit.

14. Is it necessary that a specific sum should be agreed on for the hire, in order to charge a person as a common carrier?

It is not, for if none is agreed on, he is entitled to a reasonable compensation upon the same principles which govern in every other contract for hire.—2 *Lord Raymond*, 909, 918. *Allen v. Sewal*, 2 *Wend. Rep.* 327.

15. Are not common carriers responsible for the wrongful acts of mere strangers, in regard to the property bailed to them for transportation?

They are.—*Barclay v. Cuculla & Gand*, 3 *Doug. Rep.* 389. *Proprietors of Trent and Mersey Navigation v. Wood*, 3 *Esp. Rep.* 127. *S. C.* 4 *Doug. Rep.* 287. *Abbott on Shipp.*, p. 3, ch. 3, § 9, 5th edit. *Id.* ch. 4, § 1.

16. Is not the master of a vessel employed to carry goods beyond sea, answerable as common carrier?

He is, in consideration of freight.—2 *Kent*, 600, 3d edit.

17. Does not this doctrine apply equally to the carrier of goods in the coasting trade from port to port?

It does.—*Dall v. Hall*, 1 *Wils. Rep.* 281. *Proprietors of the Trent Navigation v. Wood*, 3 *Esp. Rep.* 127. And to a bargeman and hoyman upon a navigable river.—*Rich v. Kneeland*, *Cro. Jac.* 330. *Wardill v. Mourillyan*, 2 *Esp. N. P. Cas.* 693. *Elliot v. Russel*, 10 *Johns. Rep.* 1. But as the cases are contradictory as to its application to wharfingers, and the latter cases do not make the application to them, I will leave this part to the reader by referring him to *Ross v. Johnson*, 5 *Burr. Rep.* 2825. *Maving v. Todd*; 1 *Starkie's Rep.* 72. In *Roberts v. Turner*, 15 *Johns. Rep.* 232, and in *Platt v. Hibbard*, 7 *Cowen's Rep.* 497, it was considered that wharfingers were not liable as common carriers; and unless they superadd the character of carrier to that of wharfinger, they are like warehouse-men, bound only to ordinary care.

But they are undoubtedly bound to indemnify, in cases in which they are liable as common carriers, according to the value at the place where they may have contracted to deliver the goods.—*Watkinson v. Laughton*, 8 *Johns. Rep.* 164. *Amory v. McGregor*, 15 *Johns. Rep.* 24. *Oakey v. Russel*, 18 *Martin's Louis. Rep.* 62.

18. Is there any distinction between a land and water carrier?

None at all.—4 *Kent*, 601, 3d edit. 3 *Esp. N. P. Rep.* 127. 4 *Douglass*, 287, *S. C.*

19. Is not the carrier equally liable for the acts of his servants or agents, as his own?

He is, the maxim of *respondent superior* applies. *Cavanah v. Such*, 1 *Price's Exch. Rep.* 328. *Ellis v. Turner*, 8 *Term Rep.* 531. *Williams v. Cranston*, 2 *Stark. Rep.* 82. *Middletown v. Fowler*, 1 *Salk. Rep.* 282. 1 *Bell's Com.* 455, 465, 471, 5th edit. *Hyde v. Trent & Mersey Navigation Company*, 5 *Term Rep.* 397. *Ellis v. Turner*, 8 *Term Rep.* 531. *Boyce v. Chapman*, 2 *Bing. New Cas.* 222.

20. Where the master is employed in the river transportation business, and by usage it becomes his duty to sell as well as carry the money, does not the money so received while in his possession subject him to the same liability as a common carrier?

It does.—*Kemp v. Coughtry*, 11 *Johns. N. Y. Rep.* 107. *Per Cur.* Since the decisions in 6 *Johns.* 160, 10 *Johns.* 1, it is no longer a doubt, that the owners of a vessel employed in the transportation of property are to be deemed common carriers.

Before it was converted into money, there could be no doubt, and whether in money or goods it is the same. The freight of the goods is the compensation of the whole, and the suit may be brought against the owner; and the master is his agent or servant, and they are responsible for the faithful discharge of the trust. *Judgment for Plaintiff.*

It being no part of the duty of the carrier, to sell goods and to account for the proceeds, if he sells, it is as a factor, and not as a carrier. In the absence of evidence of usage, making the master the agent of the owner in selling, it would seem he would not be liable as carrier.—*Story on Bailment*, 350.

24. Is a party who sends goods bound to disclose their value ?

When there is no notice, the better opinion seems to be that he is not unless he is asked.—2 *Kent Com. Lect.* 40, p. 603, 604, 3d edit. *Brooke v. Pickwick*, 4 *Bing. R.* 218. *Phillips v. Earle*, 8 *Pick. R.* 182. *Orange County Bank v. Brown*, 9 *Wend. R.* 25, 115. *Holles-tor v. Newlan*, 19 *Wend. R.* 234. *Cole v. Goodwin*, 19 *Wend. R.* 251. *Kenrigg v. Eggleston*, *Alley R.* 93. *Jones on Bailm.* 105. But the carrier has a right to make the inquiry, and to have a true answer; and if he is deceived, the loss will not fall on him.—2 *Kent Com. Lect.* 40, p. 603, 604, 3d edit.

22. What if the carrier makes no inquiry of the contents of the box, &c. ?

If any loss occurs, and no artifice is made use of to mislead him, he must pay the damage.—*Tichbourne v. White*, 1 *Str. R.* 145. *Gibbons v. Paynton*, 4 *Burr. R.* 2298. *Riley v. Horne*, 4 *Bing. R.* 217. *Batson v. Donovan*, 4 *Barn. & Ald.* 21. *Brooke v. Pickwick*, 4 *Bing. R.* 218. *Phillips v. Earle*, 8 *Pick. R.* 182. *Kenrigg v. Eggleston*, *Alley R.* 93. *Morse v. Slue*, 1 *Vent. R.* 238. *Tyler v. Morris*, *Carth. R.* 485.

23. Is not a common carrier answerable for the loss of a box or parcel of goods, though he be ignorant of the contents, or though those contents be ever so valuable, unless he made a special acceptance ?

He is; but the rule is subject to a reasonable qualification, and if the owner be guilty of any fraud or imposition in respect to the carrier, as by concealing the value or nature of the article, or delude him by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of the goods.—2 *Kent*, 603, 3d edit. *Fish-bourne v. White*, 1 *Str. Rep.* 145. *Phillips v. Earle*, 8 *Pick. Rep.* 182. *Malpica v. McKown*, 1 *Miller's Louis. Rep.* 248. The latter case speaks of the point as doubtful, but concludes it to be the better opinion, that the master would be responsible for a trunk or parcel received on board of a vessel, without any information of its contents, unless there be a notice or declaration that he was not to be responsible.—*Gibbons v. Paynton*, 4 *Burr. Rep.* 2298. *Clay v. Willan*, 4 *H. Black. Rep.* 268. *Batson v. Donovan*, 4 *Barn. & Ald.* 21. *Phillips v. Earle*, 8 *Pick. Rep.* 182. 2 *Kent*, 601.

24. What will excuse a carrier for refusing to take charge of goods ?

Such for instance as his coach being full, if he has no convenience of carrying such goods with security, or because they are brought at an

unseasonable time, &c. Such reasons will, if true, be a sufficient legal defence to a suit for the non-carriage of the goods.—*Batson v. Donovan*, 4 B. & Ald. 32. *Lovett v. Hobbs*, 2 Show. R. 128. 12 Mod. R. 3. *Edwards v. Sharrett*, 1 East R. 604. *Lane v. Catton*, 1 Ld. Raym. 646.

25. Is a carrier obliged to receive goods until he is ready to set out on his accustomed journey ?

He is not.—*Lane v. Cotton*, Ld. Raym. 652. 1 Conn. R. 105.

26. If the carrier deviates from the voyage, is he not responsible for all losses ?

He is, even from inevitable casualties.—*Davis v. Garrett*, 6 Bing. R. 716. *Crosby v. Fitch*, 12 Conn. R. 410.

27. For what is a carrier for hire, in a particular case, and not exercising the business of a common carrier, answerable ?

Only for ordinary neglect, unless he by express contract assumes the risk of a common carrier.—*Robinson v. Dunmore*, 2 Boss. & Pull. 416.

But if he be a common carrier the law regards him as an insurer. This has been the settled law of England for ages, and it is founded on the same broad principles of public policy and convenience which govern the case of innkeepers.—*Co. Litt.* 89. *Woodleife v. Curtis*, 1 Roll. Abr. 2 E. pl. 5. *Lord Holt*, in *Coggs v. Bernard*, 2 Ld. Raym. 918. *Lee*, Ch. J., in *Dale v. Hall*, 1 Wils. Rep. 281. *Forward v. Pittard*, 1 Term Rep. 27. *Proprietors of the Trent Navigation v. Wood*, 3 Esp. Rep. 127. *Riley v. Horne*, 5 Bing. Rep. 217. *Gordon v. Little*, 8 Serg. & Rawle's Pen. Rep. 500, 503. *Allen v. Sewal*, 2 Wend. N. Y. Rep. 327, 340. 6 Wend. 335, S. C.

But the rule in some of the civil law countries is not carried to the severe extent of the English common law. Thus, in France, common carriers are not liable for losses resulting from superior force, as robbery, for that comes within the *damnum fatale* of the civil law.—*Code Civil*, art. 1782, 1784, 1929, 1954.

And the same rule has been adopted in the civil code of Louisiana. *Art.* 2722, 2725, 2939.

And by the Roman law carriers were not liable for a loss by an accidental fire or conflagration in a city, while the goods were in their custody.—*Dig. Lib. Tit. 6 and 13.* *Pothier*, *Pand. Lib.* 19, *Tit.* 2, *N.* 30.

28. How is loss by fire in Scotland considered ?

As one happening by inevitable accident, and for which the carrier is not responsible ; but Mr. Bell insists that loss by robbery ought not to be deemed an exception to the responsibility of the carrier, and that the many practical illustrations in the English law ought to be received “ as of more authority than hundreds of dicta rescued from the cobwebs of the civilians.”—1 *Bell's Com.* 470.

29. Does it lie on the employer to show how the loss was occasioned ?

It does not ? but the law presumes against the carrier, until he proves that the loss happened by means, or under circumstances, by which he is not answerable.—1 *T. R.* 33. *Murphy v. Staton*, 3 *Munf. (Va.)* 239. *Story on Bail*, 338. Were it not for such a rule, the carrier might contrive, by means not to be detected, to be robbed of his goods in order to share the spoil.—*Jones on Bailment*, 79—85. *Lord Holt in Coggs v. Bernard*, 2 *Lord Raym.* 909. *Barclay v. Hygena*, cited in 1 *Term Rep.* 33. *Trent Navigation Company v. Wood*, 3 *Esp. N. P. Rep.* 127. *Hyde v. Trent and Mersey Navigation Company*, 5 *Term Rep.* 389. *Forward v. Pittard*, 1 *Term Rep.* 27, 33. *Murphy v. Staton*, 3 *Munf. Rep.* 239. *Bea v. Reed*, 4 *Binn. R.* 127. *Colt v. McMahon*, 6 *Johns. R.* 160. See *Whaley v. Wray*, 3 *Esp. Rep.* 74. *Riley v. Horne*, 5 *Bing. Rep.* 217, 220. See 7 *Coven Rep.* 500 and note. *Hastings v. Pepper*, 11 *Pick. R.* 41, 43. 2 *Kent's Com.*, Lect. 40, p. 602, 3d Edit. See 1 *Bell's Com.*, p. 463, 464, 5th edit. *Shackelford v. Wilcox*, 9 *Louis (Curry) Rep.* 33. See 1 *Sack. R.* 143. 1 *Bell's Com.*, § 397, 4th edit. *Beekman v. Shouse*, 5 *Rawle R.* 179.

30. Is it not well settled that a carrier cannot either capriciously in a single instance, nor by public notice, seen and read by his customers, exonerate himself from the consequences of gross neglect ?

It is ; nor even by special agreement.—*Per Best, C. J.*, in *Riley v. Horne*, 5 *Bing.* 217. 2 *Moore & Paine*, 331, 347, *S. C.* *Sleatt v. Fagg*, 5 *Barn. & Ald.* 342. *Wright v. Snell*, id. 350. *Birket v. Willan*, 2 *Barn. & Ald.* 356. *Beek v. Evans*, 3 *Camp.* 267. 16 *East*, 244, *S. C.* *Bodenham v. Bennet*, 4 *Price* 31. *Smith v. Horne*, 8 *Taunt.* 144. 2 *Moor*, 18, *S. C.* *Newborn v. Just*, 2 *Carr & Payne*, 76. *Hyde v. Trent Navigation Company*, 1 *Esp. Rep.* 36. *Maving v. Todd*, 1 *Stark*, 72, *Bodenham v. Bennet*, 4 *Price R.* 34. *Brooke v. Pickwick*, 4 *Bing. R.* 218. *Harris v. Packwood*, 3 *Taunt. Rep.* 264. *Jones on Bailment*, 48. *Doctor & Stud, Dial.* 2, ch. 38. *Noy's Maxims*, ch. 43, p. 98. *Lyons v. Mells*, 5 *East Rep.* 430, 438. *Harris v. Packwood*, 3 *Taunt. Rep.* 264, 272. 1 *Williams' Saund. Rep.* 312, note. *Batson v. Donovan*, 4 *Barn. & Ald.* 21, 32. 3 *Kent's Com.*, Lect. 40, p. 606, 607, 3d edit. *Smith on Mercantile Law*, b. 3, ch. 2, p. 233—238, 2d London edit., 1838. *Camden & Amboy Railroad Company v. Burke*, 13 *Wend. Rep.* 611, 627, 628, 450, 545. *Owen v. Burnett*, 2 *Cromp. & Mees*, 353. *Beekman v. Johnson*, 5 *Rawle R.* 179, 189. *Hollister v. Newben*, 19 *Wend. Rep.* 234. *Cole v. Goodwin*, 19 *Wend. Rep.* 251, 261. *Beck v. Evans*, 16 *East*, 244.

31. Is not gross negligence a species of fraud ?

Generally it is so, not always.—*Story on Bail*, p. 13, § 19—22.

32. Has it not been held by a number of decisions, as in the English courts, that a special acceptance of goods limits the responsibility of the carrier ?

It has.—*Morse v. Slue*, 1 Vent. 190. *Fishbourne v. White*, 1 Stra. 145. These limitations of responsibility arise principally under notice, which by repeated adjudications have grown up into a system, and although their legality was formerly doubted.—*Lyon v. Mills*, 5 East, 428. *Laws v. Kernde*, 8 Taunt, 146. *Down v. Tremont*, 4 Campb. N. P. 41. In the case of *Nicholson v. Willan*, 5 East, 507, Lord Ellenborough observed, that considering the length of time, during which such notices had been in use, and the extent and universality to which the practice of making such special acceptances of goods for carriage, had prevailed in the kingdom, under the observation and sanction of the legislature itself, he could not say that such an agreement or notice was contrary to law.

32. Is not evidence of usage or custom, fixing the construction of the words "inevitable dangers of the river," admissible?

It is. So may usage or custom varying the liability of common carriers by water, from that of common law, be proved.

33. Does the law regulating the responsibility of common carriers, apply to the case of carrying intelligent beings, such as negroes?

It does not.—*Boyce v. Anderson*, 2 Peters' Rep. 155.

34. Where an accident occurs to a boat, even though unavoidable, must not the master use proper diligence in rescuing the cargo from damage?

He must.—*The Charleston & Columbia Steamboat v. Bason*, 1 Harper's South Carolina Rep. 262.

35. Are not common carriers bound to deliver to each passenger at the end of his journey, his trunk or baggage?

They are; it seems, however, if the delivery be conformable to well established and notorious usage known to the passenger, that the carrier is discharged.—*Cole v. Goodwin*, 19 Wendell's Rep. 251.

36. Is a passenger required to expose his person in a crowd, or endanger his safety in an attempt to designate or claim his property?

He is not.—*Cole v. Goodwin*, 19 Wendell's Rep. 251.

HOW CARRIERS' LIABILITY MAY CEASE.

1. Will destruction by fire discharge a carrier from liability?

It will not; nor will robbery by armed men discharge him from liability.

Holt, C. J., in pronouncing his celebrated judgment in the case of *Coggs v. Barnard*, 2 Lord Raymond, 918, said, "this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons,

that they may be safe in their ways of dealing." In *Forward v. Pittard*, 1 T. R. 27, where the carrier was held liable for a loss by fire, Lord Mansfield said, "to prevent litigation, collusions, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempest." And in relation to a loss by robbery he said, "the true reason is, for fear it may give room for collusion, that the carrier may contrive to be robbed on purpose, and share the spoil."

2. If a common carrier refuse a passenger, to carry goods according to the course of his particular employment, will he not be liable to an action?

He will, and can only demand a reasonable compensation for his services, and the hazard which he incurs.—2 Lord Raymond, 917, *Bac. Abr. Carriers (b.) Skin.* 279. 1 Salk. 249, 250. 5 Bing. 217. 3 Taunt. 272. Per Lawrence, J. 2 Kent, 599. Story on Bailments, 328. Jeremy on Carriers, 59. 2 Kent's Com., 598, 3d edit. and cases there cited in note f. Per Mansfield, C. J., and Lawrence, J., in *Harris v. Packwood*, 3 Taunt. 271, 2. Per Best, C. J., in *Reily v. Horne*, 5 Bing. 217. 2 Moor. & Payne, 331, 338, S. C. *Jackson v. Rogers*, 2 Shaw. Rep. 432. Lord Kenyon & Ashurst, in *Elsee v. Gatward*, 5 Term Rep. 143. Holroyd, J., in *Batson v. Donovan*, Barn. & Ald. 32. 1 Bell's Com., 467. *Bac. Abridg. Carriers (b.) Boulsten v. Sandeford*, Skin. Rep. 279. *Jackson v. Rogers*, 2 Show. Rep. 328. 1 Saund. Reports, 312 c. *Macklin v. Waterhouse*, 5 Bing. Rep. 212. *Hollister v. Newlan*, 19 Wend. Rep. 234, 239. *Cole v. Goodwin*, 19 Wend. Rep. 251, 261, 271, 272.

3. Where by custom a delivery on the dock, is a delivery to the carrier, must it not always be accompanied with notice?

It must.—*Packard v. Getman*, 6 Cowen's N. Y. Rep. 757.

4. Will proof of usage exempt the carrier from liability in delivering the goods?

It will not.—*Ostrander v. Brown*, 15 Johns. N. Y. Rep. 29. 2 Johns. Cas. 371. In foreign voyages a delivery on the wharf according to usage held to discharge the carrier, unless the consignee should otherwise request them to be delivered from the ship; but in respect to goods carried coastwise, a delivery upon the wharf has been held not to discharge the carrier; even in a case of usage so to deliver goods. Neither will a delivery to a cartman, without the orders of the consignee, discharge the carrier from liability, even though such is the usage.

5. Where the vessel is let to the master on shares, reserving no control over her, is the owner liable?

He is not.—*Thompson v. Snow*, 4 Greenl. Me. Rep. 255.

6. Will a notice exempt the carrier from responsibility for losses oc-

casioned by a defect in the vehicle or machinery, used for the transportation?

It will not, for there is a breach of the implied warranty. It will amount to negligence, if they are not in such condition, and the carrier might by the exercise of proper diligence have ascertained it. In fact, it has been held if the defect is not discoverable on inspection, and no negligence or want of care can be attributed to the carrier, and there is a notice that "all baggage is at the risk of the owner," the carrier will, notwithstanding, be liable for any loss occasioned to the baggage, by a defect of the vehicle or machinery.—*Lyon v. Mills*, 2 East, 428. *Sharp v. Gray*, 9 Bing. Rep. 457, 509, 562. *Camden & Amboy Railroad Co. v. Burke*, 13 Wend. Rep. 611, 627, 628. The ground of the decision seems to be that the notice does not apply to this implied warranty of road worthiness; and that the general liability of carriers for all losses not occasioned by the act of God, or the public enemies, is the true criterion which governs in such cases.—*Ibid*.

7. Are not carriers bound to give notice of the arrival of the goods to the person to whom they are directed?

Generally so; but uniform usage or custom to leave them at a particular place of deposit, where the carrier is accustomed to stop, at the risk of the owner of the goods, without giving him any notice, will exonerate the carrier.—*Gatliffe v. Bourne*, 4 Bing. New Cas. 314, 330, 331. *Gibson v. Culver*, 17 Wend. R. 305, 306.

8. If the consignee of goods require the goods to be delivered to himself, on board of the ship, and directs them not to be landed on a wharf, must not the master obey the request?

It seems so.—*Syeds v. Hay*, 4 Term R. 260. *Abbott on Shipp.*, p. 3, ch. 3, § 12, 5th edit.

It seems this rule has many qualifications. The rule adopted in regard to foreign voyages in the United States, (although it has been much contested,) seems to be, that in cases of this kind the carrier is not bound to make a personal delivery of the goods to the consignee.

But the consignee, after notice, is bound to take charge of them himself.

General usage seems also to lend its aid in confirming the rule.

But the very essence of the rule will depend upon timely notice given to the consignee, so as to take charge of them. The carrier will not be discharged by sending the goods to the consignee, however common the practice may be. Even if the consignee be unable or refuse to receive the goods, the carrier is not exonerated by leaving them on the wharf; but he must take care of them for the owner.

As to the question, at what time is the carrier bound to make a delivery of the goods?

The general answer is, that he is bound to deliver the goods within a reasonable time.—*Cape v. Cordova*, 1 Rawle R. 203. *Chickering v. Fow-*

ler, 4 *Pick. Rep.* 371. *Ostrander v. Brown*, 15 *Johns. Rep.* 39. *Kohn v. Packard*, 3 *Miller's Louisiana R.* 225. *Picet v. Dormer*, 4 *Verm. R.* 21. *Gatliffe v. Bourne*, 4 *Bing. New Cas.* 314, 330, 331, 332. 2 *Kent Com.*, *Lect.* 40, p. 604, 605, and note, 3d ed. *Mayell v. Potter*, 2 *Johns. Cas.* 371. *Stephenson v. Hart*, 4 *Bing.* 476. 2 *Kent Com.*, *Lect.* 40, p. 604, 605, and note (c) 3d edit.

9. Does not the manner of delivering the goods, and consequently the period at which the responsibility of the carrier will cease, depend in many instances upon the custom of particular places, and the usage of particular trades?

It does; or upon a special contract between the parties. But if there is any special contract between the parties, or any local custom or usage of trade on the subject, that will govern; the former as an express, and the latter as an implied term in the contract.—*Wardell v. Mourillyon*, 2 *Esp. R.* 693. 8 *Taunt. R.* 443. *Abbott on Shipp.*, p. 3, ch. 3, § 12, 5th edit. *Gatliffe v. Bourne*, 4 *Bing. New Cas.* 314, 329. *Cope v. Cordova*, 1 *Rawle R.* 203. 1 *Valin. Com.* 636. *Ostrander v. Brown*, 15 *Johns. R.* 39. *Gibson v. Culver*, 17 *Wend. R.* 305, 311. *Hyde v. Trent Navigation Co.* 5 *Term Rep.* 389. *Calley v. Wintringham*, *Peake R.* 150. *Goldon v. Manning*, 3 *Wills. C.* 420.

10. Suppose the owner of a ship is master, and also is consignee of the goods of shippers, which are put on board for sale, when do his rights and responsibility commence and terminate in each capacity?

It has been decided, that during the voyage he retains the character of owner and master; and of course during the voyage he is responsible as carrier.—*Cook v. Com. Ins. Co.*, 11 *Johns. R.* 40. *Earl v. Rowcroft*, 8 *East R.* 126, 140. *Crousillat v. Ball*, 4 *Dall. R.* 294.

11. Where the goods are denied admittance on account of being prohibited articles, when does the carrier's liability cease?

The carrier's liability* does not end until the goods are returned to the shipper, especially where he agrees to return, although endorsed on the bill of lading, *at risk of shipper*.—*Shieffelin v. Harvey*, 6 *Johns. Rep.* 170.

But it is said that by the endorsement on the bill of lading, it was agreed, "that the goods were to be returned to the shippers at their own risk," and that this amounts to a special acceptance. Whatever be the meaning of these words, it never could be designed to throw a loss arising from embezzlement by the crew, or others, upon the shippers. The agreement of the parties, to control the operation of the law, must be clear, and admit of but one construction.

12. When does the responsibility of a common carrier commence?

Not until there has been a complete delivery to him; and if, according to the usage of the business, it be a sufficient delivery to leave the goods

on the dock, by or near the carrier's boat, yet this must be accompanied with express notice to the carrier.—*Packard v. Getman*, 6 Cowen's Rep. 757. And see also *Selway v. Holloway*, 1 Ld. Raym. 46. *Cobban v. Downe*, 5 Esp. Rep. 41.

13. How long does the responsibility of a common carrier continue?

Until there has been a due delivery by him, or he has discharged himself of the custody of the goods in his character of common carrier.—*Garside v. Trent and Mersey Navigation Co.*, 4 Term Rep. 581. *Hyde v. Trent and Mersey Navigation Co.*, 5 Term Rep. 389.

14. From what was the responsibility of a common carrier (to wit, that he must be answerable for all losses which do not fall within the excepted cases of the act of God, or inevitable accident without the intervention of man, and public enemies,) taken?

From the edict of the prætor in the Roman law.—*Dig.* 4, 9, 1.

15. If a carrier between A and B receive goods to be carried from A to B, and thence to be forwarded by a distinct conveyance to C, when does his liability cease?

His liability ceases when he deposits them in his warehouse. He then becomes, as to the goods, a mere warehouse-man, undertaking for their future transportation.—*Ackley v. Kellogg*, 8 Cowen's R. 223. *Garside v. Trent and Mersey Navigation Company*, 4 T. R. 581.

16. If a man, having no warehouse of his own, directs the carrier to leave his goods at the wagon-office, until he should find it convenient to remove or sell them, when does the carrier's responsibility terminate?

It terminates with the deposit.—*Rowe v. Pickford*, 8 Taunt. Rep. 83. *S. C.* 1 Moore R. 526. *Allen v. Griffin*, 2 Cromp. & Jerr. 218. *S. C.* 2 Tyrw. R. 217. *Abbott on Shipp.*, p. 3, ch. 9, § 12, 5th ed. *Richardson v. Goss*, 3 Boss. & Pull. 119. *Scott v. Petit*, 3 Boss. & Pull. 472. *Dixon v. Baldwin*, 5 East's Rep. 181.

17. Will not an express agreement to carry a package of extraordinary value for the common hire, be a waiver of the notice?

It will, even if made by one partner only, if it be within the scope of his authority.—*Healsby v. Mears*, 5 Barn. & Cresw. 504.

18. Where a carrier throws goods overboard to lighten a ship or boat and preserve life, will he be held accountable for the loss of the goods?

He will not, if it has arisen from necessity.—2 Kent's Com. Lect., 40. p. 604, 3d ed. *Jones on Bailment*, 107, 108. *Abbott on Shipp.*, p. 3, ch. 8, § 2, 3, 4, 5th ed. *Mouse's Case*, 12 Co. Rep. 63. *Barcroft's Case*, cited in *Kenrigg v. Eggleston*, Aleyn. Rep. 93. *Smith v. Wright*, 1 Caine's Rep. 43. 2 Kent's Com. Lect. 40, p. 525, 531. But if it was done with-

out necessity, or rashly, or imprudently, it would be otherwise.—*Jones on Bailment*, 107, 108. *Bird v. Astock*, 2 *Bulst. Rep.* 280. 2 *Roll. Abridg.* 567, 525, 531. *Barcroft's Case*, cited in *Kenrigg v. Eggleston*, *Aleyn. Rep.* 93.

PERILS OF THE SEA, ACT OF GOD, &c.

1. What does the phrase "perils of the sea" import?

The precise import of this phrase is not perhaps very exactly settled. See *Pothier, Traité de Depot*, 32. Sir William Jones has remarked, that "the word peril, like *periculum*, from which it is derived, is in itself ambiguous, and sometimes denotes the risk of inevitable mischance, and sometimes the danger arising from the want of due circumspection.—*Jones on Bailment*, 98. *Dig. Lib.* 47, *Tit.* 5. l. 1, § 4. *Lord Mansfield*, in *Forward v. Pittard*, 1 *Term Rep.* 33, said, "there is a nicety of distinction between the act of God and inevitable necessity."

The Roman law held a loss by pirates to be inevitable casualty. *Si quid naufragio, aut per vim piratorum perierit, non esse iniquum, exceptionem ei dari.* *Dig. Lib.* 4, *Tit.* 9, l. 1, 3, §. 3 *Kent's Com.*, *Lect.* 47, p. 216, 217, 299, 300, 3d ed. *Pickering v. Barclay*, 2 *Roll. Abridg.* 248, cited *Abbott on Shipp.*, p. 3, ch. 4, § 2, 3, 5th ed. *Barton v. Wolleford*, *Comber, Rep.* 56. *Abbott on Shipp.*, p. 3, ch. 4, § 1, 2, 3, 4, 5, 6, 5th ed. *Park. Insur.*, ch. 3. *Marsh's Insur.*, b. 1, ch. 7, p. 214. *Id.* b. 1, ch. 12, § 1, p. 487. *Id.* b. 2, ch. 5, p. 753. 1 *Bell's Com.* 559, 579, 5th ed. 1 *Bell's Com.*, § 501, 517, 518, 4th ed. 3 *Kent's Commen.*, *Lect.* 47, p. 230, 231, 3d ed. *Abbott on Shipping*, p. 3, ch. 4, § 5, 5th ed.; p. 3, ch. 8, § 12, 5th ed. *Buller v. Fisher*, 3 *Esp. Rep.* 67. 1 *Bell's Com.* p. 579, 580, 581, 5th ed.

But I apprehend the phrase "perils of the sea," whether understood in its most limited or more extended sense, in either case must be understood to include such losses only to the goods on board, as are of an extraordinary nature, or arise from some irresistible force, or from some overwhelming power which cannot be guarded against by the ordinary exertion of human skill and prudence.—3 *Kent's Com.*, *Lect.* 48, p. 229, 300, 3d ed.; *Lect.* 47, p. 216, 217. *The Schr. Reeside*, 2 *Sumner's Rep.* 567. *Potter v. Suffolk Insurance Company*, 2 *Sumner's Rep.* 197. *Hollingsworth v. Brodrick*, 7 *Adolph. & Ell.* 40. *Waters v. Merchants' Louisville Insurance Company*, 11 *Peters' S. C. Rep.* 213.

2. If goods are destroyed by necessity, as by throwing them overboard, from a vessel or barge, for the preservation of the vessel and crew in a tempest, is the carrier liable?

He is not.—*Smith v. Wright*, 1 *Caine's Rep.* 43.

3. Are the effects of storms and tempests in straining the ship, or causing her to spring a leak or to ship a sea, whereby damage or injury is done to the goods on board, losses properly attributable to perils of the sea?

They are, although, in a mitigated sense, they may be said to be ordinary accidents.—1 *Bell's Com.*, p. 560, 5th edit. 1 *Bell's Com.*, § 501, 4th edit. *Abbott on Shipping*, p. 3, ch. 3, § 9, 5th edit.

4. If a carrier-ship is properly moored in a harbor, having a hard, uneven bottom, and on the reflux of the tide, in consequence of a considerable swell, she strikes hard on the bottom, and her knees are injured, and thereby her cargo is damaged, is such a loss to be deemed a loss by perils of the sea?

It is.—*Fletcher v. Ingles*, 2 *Barn. & Ald.* 315. *Kingsford v. Marshall*, 8 *Bing. Rep.* 458. *Potter v. Suffolk Insur. Comp.* 2 *Sumner's Rep.* 197.

5. If a carrier-ship is taken in tow by a ship of war, and in order to keep up, she is obliged to use an extraordinary press of sail, in a gale of wind, and thereby her cargo is injured, is it a loss by the perils of the sea?

It is.—*Hagedorn v. Whitmore*, 1 *Stark. Rep.* 157.

6. If, in moving a ship from one part of a harbor to another, it becomes necessary to send some of the crew on shore to make fast a new line, and to cast off a rope by which she is made fast, and these men are impressed immediately before casting off the rope, and thereby the ship goes on shore, is it a loss by the perils of the sea?

It is.—*Hodgson v. Malcolm*, 5 *Boss. & Pull.* 336.

7. Will it not be deemed a loss by the perils of the seas when damage occurs, on account of a storm, to live-stock on board, such as horses and the like?

It will, if the damage arose solely on account of the storm, and the carrier will not be held liable for the damage.—*Gobay v. Loyd*, 3 *Barn. & Cresw.* 793. *Lawrence v. Aberdeen*, 4 *Barn. & Ald.* 107.

8. Is not a loss occasioned by rats at sea, a peril by sea?

It is, if there is no default in the carrier.—*Garrigues v. Cox*, 1 *Binn. Penn. Rep.* 592.

But loss by worms is not a peril by sea.—*Martin v. Salem Ins. Co.*, *March T.*, 2 *Mass. Rep.* 429. *De Piester v. Columbian Ins. Co.* 2 *Caines' N. Y. Rep.* 85.

9. May not usage, varying the liability of the carrier, be proved?

It may, and also fixing the construction of the words, "inevitable danger of the seas."—*Adam v. Hay*, 3 *Murphy's N. C. Rep.* 149.

10. Is the carrier liable, where the vessel strikes on a rock, not generally known?

He is not, if he actually did not know the rock, and no want of pru-

dence, skill, or attention on his part.—*Williamson v. Grant*, 1 *Com. Rep.* 487. But it would be otherwise if the master was ignorant of navigation in that place, and had no pilot on board.

11. May not a carrier show, in his defence, that the goods have perished by some internal defect, without any fault on his side?

He may, for his warranty does not extend to such cases.—2 *Rolle's Abridge.* 525, 531, 567.

12. What are losses by the act of God?

It is a matter of some nicety to decide, but generally understood to be lightning, earthquakes, and tempests; and not accidents arising from the negligence of man.—*Jones on Bailment*, 103, 107, 122. *Co. Lit.* 89. *Coggs v. Bernard*, 2 *Lord Raymond*, 909, 917. 12 *Mod. R.* 480. *Forward v. Pittard*, 1 *Term Rep.* 33. *Abbott on Shipp.*, p. 3, ch. 4 § 1, 5th ed. *Park Insur.*, ch. 3. *Phillips on Insurance*, ch. 13, § 7.

13. Is not a loss occasioned by a sudden change of the wind, deemed a loss by the act of God?

It is.—*Colt v. M'Mechan*, 6 *Johns. N. Y. Rep.* 160.

In this case it appeared in evidence, that while the vessel was beating up a river, against a light and variable wind, while changing her tack, the wind failed or changed, and the vessel went on shore, and her cargo injured. Held a loss by the act of God. The master not in fault, as clearly appeared.

Spencer, C. J. The case of 1 *Stra.* 128, shows that a sudden gust of wind, by which the hoy of the carrier, shooting a bridge, was driven against a pier, and upset by the violence of the shock, was adjudged the act of God.

Kent, C. J., concurred generally in the doctrine of the court, but thought there was a degree of negligence in the master, in sailing so near the shore, under a light and variable wind, and that a failure in coming about would cast him aground.

14. What is to be understood by king's enemies, in regard to carriers, with respect to losses?

By enemies, is to be understood public enemies, with whom the nation itself is at war; and not merely robbers, thieves, or other private depredators, however much they may be deemed, in a moral sense, at war with society. Losses, therefore, which are occasioned by robbery on the highway, or by the depredation and violence of mobs, rioters, and insurgents, and other felons, are not deemed losses by enemies, within the meaning of the exception.

But losses by pirates, on the high seas, are deemed within it.—*Barclay v. Hygena*, cited 1 *Term Rep.* 33. *S. C.* under the name of *Barclay v. Cuculla y Gana*, 3 *Doug. R.* 389. *Mash on Insurance*, b. 1, ch. 7, § 5, p. 242, etc. *Jones on Bailment*, 103, 107, 122. *Moss v. Slue*, 1 *Vent. R.*

190, 238. *Proprietors of Trent Navigation v. Wood*, 3 *Esp. R.*, 127. *S. C. 4 Doug. R.* 287. *Coggs v. Bernard*, 2 *Lord Raymond*, 909, 918. 12 *Mod. R.* 480. *T. Raymond*, 220. *Woodleiffe v. Curties*, 1 *Roll. Abridg.* 2.

15. What is the meaning of the words in the bill of lading, "the dangers of the river only excepted?"

They mean the natural accidents incident to a river navigation.—*Williams v. Brandson*, 1 *Murphy's N. Ca. Rep.* 417.

Taylor, J., in the above case against the defendants as common carriers. It appears he took on board his boat a hogshead of sugar, to be carried from Wilmington to Fayetteville, and gave a receipt, in which he promised to deliver, "the dangers of the river only excepted." There was a considerable freshet in the river, and the hogshead was placed behind the hatches, there being no other place for it. In passing a bend of the river a cypress tree came in contact with it, and forced it overboard, by which accident it was lost.

The court said that freighters for hire, upon navigable rivers, are to be considered as common carriers.

REMEDY AGAINST CARRIERS.

1. If a common carrier loses goods he is intrusted to carry, what action lies against him?

A special action on the case lies against him on the custom of the realm; and so of a common carrier by boat.—1 *Roll. Rep.* 6.

2. Will an action lie against a porter, carrier or bargeman, upon his bare receipt of the goods if they are lost?

Yes, if they are lost by negligence.—1 *Sid.* 36.

3. What if a lighterman spoil goods he is to carry, by letting water come to them?

An action on the case lies against him, on the common custom.—*Palm.* 528.

4. If one be not a common carrier and take hire, upon what may he be charged?

He may be charged on a special *assumpsit*; for where hire is taken a promise is implied.—*Cro. Jac.* 262.

5. If a man who is not a common carrier, and who is not to receive a premium, undertake to carry goods safely, for what is he answerable?

He is answerable for any damages they may sustain, through his neglect or default. This was the express point determined in *Coggs v. Bernard*, 2 Lord Raymond, 909. 1 Com. Rep. 133.

6. Where a carrier intrusted with goods, opens the pack, and takes away and disposes of a part of the goods, of what is he guilty?

He is guilty of felony, for this shows an intent of stealing them.—*H. P. C.* 61. And it is the same if the carrier received goods to carry them to a certain place, and carried them to some other place and not the place agreed. That is, if he do it with intent to defraud the owner of them.—3 Inst. 367.

7. If a carrier, after he hath brought goods to the place appointed, take them away privately, of what is he guilty?

He is guilty of felony, for the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger.—*Hawk, P. C.*, c. 33, § 5.

8. Will an action lie against a common carrier for refusing to carry goods?

Yes, if he has convenience for so doing.—1 Saund. 312. 2 Show. Rep. 327.

9. Does *case*, or *trover*, lie against a common carrier?

Either; but in the latter action the plaintiff must prove a conversion.—*Lockwood v. Bull*, 1 Cowen, 330. *Packard v. Getman*, 6 Cowen's N. Y. Rep. 750.

Case is the proper remedy against the carrier, where the goods have been lost by negligence.—*Packard v. Getman*, 4 Wend. N. Y. Rep. 613.

10. May not the consignee maintain *trover* for the non-delivery of goods consigned to him?

He may.—*The President of Portland Bank v. Stubbs et al.*, 6 Mass. Rep. 422.

But *trover* will not lie against a common carrier, for goods which have been lost; the remedy is an action on the contract.—*Moses v. Morris*, 4 N. Hamp. Rep. 304, *Judah et al. v. Kemp*, 2 Johns. Cas. 411.

Per *Ld. C. J. Wilmot*—I own that in many books it is reported that *trover* and a count against a common carrier, cannot be joint; but common experience and practice are now to the contrary.—*Dixon v. Clifton*, 2 Wils. 319. The case his lordship referred to, was, *Dalston v. Janson*, 5 Mod. 91. Per *Lord Ellenborough*, if a count against a common carrier were laid, not on the terms of the contract, but upon the breach of duty, it is daily, and convenient, and well warranted practice to join them.—*Govitt v. Radnige*, 3 East, 69. And *Lord Ellenborough* held, in the case of *Severn v. Keppel*, 4 Esp. 156, that for a mere neglect or non-delivery by

the carrier, the action will not lie. A conversion must be proved.—*Gavitt v. Rudnige*, 3 *East*, 69. *Richardson v. Atkinson*, 1 *Str.* 567. *Samuel v. Dorch*, 2 *Stark. N. P. C.* 60.

11. Is not an action against a common carrier upon the custom, founded upon a tort?

It is, and arises *ex delicto*; and it is unnecessary to join as defendants, all the owners of the vehicle employed in the conveyance.—*Orange Bank v. Brown*, 3 *Wendell's Rep.* 158.

12. Are there not many strong cases of recovery against common carriers without any fault on their part?

Yes, the books abound with them.—2 *Kent*, 602, 3d edit. In *Morse v. Slue*, armed persons had entered on board the vessel in the night time, in the river Thames, under pretence of impressing seamen, and plundered the vessel. And in *Forward v. Pittard*, 1 *Term Rep.* 27, the common carrier lost a parcel of hops by fire, which in the night originated within one hundred yards of the place where he had deposited the hops, and raging with irresistible violence, it reached and destroyed them. The loss in both these cases was by inevitable misfortune, without the least shadow of neglect or fault imputable to the carrier, and yet Sir Matthew Hale, in the one case, and Lord Mansfield, in the other, delivered the unanimous opinion of the K. B. in favor of a great principle of public policy, which was proved to be of eminent value to the morals and commerce of the nation in succeeding generations.

The rule makes the common carrier in the nature of an insurer, and answerable for every loss not to be attributed to the act of God or public enemies.

According to Lord Holt, it was “a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliged them to trust these sorts of persons; and it was introduced to prevent the necessity of going into circumstances impossible to be unravelled.”—2 *Kent*, 602, 3d edit.

RIGHTS OF CARRIERS.

1. Will not a carrier be entitled to reimbursement, in case floods, storms, or the like, should so far injure goods under his charge as to require immediate expense for their preservation?

He will; if not to a common contribution in the nature of a general average, at least to a compensation for expenses necessarily incurred.—*Story on Ag.*, § 141, the *Gratitudine*, 3 *Rob. R.* 255—258.

2. Has not the carrier a lien upon the luggage or baggage of a passenger, for his fare or passage money?

He has, but not on the person of the passenger, or the clothes he has on.—*Abbott on Shipp.*, p. 3, ch. 3, § 11, 5th edit. *Wolf v. Sumners*, 2 Camp. R. 631.

3. Have not the court of admiralty a general jurisdiction in what are technically called cases of collision—that is, where damage arises from two vessels meeting on the high seas?

They have.—*The Dundee*, 1 Hagg. R., 109. *Gale v. Lawrie*, 5 B. & Cresw. 156. *The Public Opinion*, 2 Hagg. Adm. R. 398. *The Thames*, 5 Rob. R. 308.

Various positive regulations have been adopted by the legislature of New-York, in regard to the conduct of proprietors of canal boats.—See *Act of New-York of 13th April, 1820*, ch. 202, cited 6 Cow. R. 609.

4. Does not the delivery of the carrier invest the goods in the consignee?

It does.—*Dawes v. Peck*, 8 T. Rep., 830. *Dutton v. Solomonson*, 3 B. & P. 532. Nor is the rule changed by the consignor's paying and booking the goods.—*Dutton v. Solomonson*, 3 B. & P. 532. Or being responsible for the price of the carriage.—*Rex v. Meredith*, 2 Camp. 639. But the consignor may maintain an action against the carrier for the loss of the goods.—*Davis v. Jones*, 5 Burr. 2680. So also where there is a privity of contract, by a bill of lading, or otherwise, the consignor may sustain an action against the carrier.—*Joseph v. Knox*, 3 Camp. 321. And see *Sergeant v. Morris*, 3 B. & A. 277. *Evans v. Marlett*, 1 Ld. Raym. 271.

5. May not the carrier refuse to receive the goods, until payment of the freight is made?

He may. But if he does receive them, the hire not being paid, he may afterwards sue for, and recover it in an action. So long as he retains possession, he has a lien on the goods for the hire, but when he delivers possession to the consignee, or his assigns, he waives it.—8 Taunt. 393. *Barker v. Haven*, 17 Johns. N. Y. Rep. 134. 2 Marsh. Ky. Rep., 345. 2 Kent's Comm. 497. *Hartshorne et al. v. Johnson et al.*, Sept. T. 1823, Supreme Court, New Jersey, 1 Conn. Rep. 186. 2 Kent's Comm. 497, 498. Vide 8 Taunt. 293. *Batson v. Donovan*, 4 Barn. & Ald. 32. 1 Saund. R. by Williams, 312, a. *Wright v. Snell*, 5 Barn. & Ald. 353. *Jackson v. Rogers*, 2 Show. R. 327. *Morse v. Slue*, 1 Vent. 238. *Skinner v. Upshaw*, 1 Lord Raym. 752. *Sodergren v. Flight*, 6 East's Rep. 662. *Hutton v. Bragg*, 2 Marsh. R. 345. *Kushforth v. Hadfield*, 6 East's Rep. 522. 2 Kent's Comm., Lect. 40, p. 611; Lect. 41, p. 634, 642, 3d ed. *Stephenson v. Blacklock*, 1 M. & Selw. 186. *Crawshay v. Homfrey*, 2 Barn. & Ald. 50. *Kinloch v. Craig*, 3 Term Rep. 119. *Sweet v. Pym*, 1 East's R. 4. *Yates v. Railston*, 8 Taunt. Rep. 293. 2 Kent's Com. 611, 634, 642, 3d ed.

6. When the vessel is disabled in the course of the voyage, and the cargo

remains; is not the captain authorized to forward it by another vessel, and thereby earn freight?

He is. The master in a port of necessity, must act for the benefit of all interested; his duty, however, in regard to forwarding goods is only imperative, when another vessel can be had in the same or some convenient port.—*Bradhurst v. Columbia Insurance Co.*, 9 Johns. N. Y. Rep. 17.

7. Is it not settled tha. a carrier cannot dispute the title of a party who delivered goods to him?

It is.—*Miles v. Cattle*, 6 Bing. Rep. 743.

8. If a carrier sells the goods intrusted to him will it vest any title in the purchaser?

None at all.—*Hardy v. Metzgar*, 2 Yates, 347. *Easton v. Worthington*, 5 S. & R. 130. *Lecky v. M'Dermot*, 8 Ser. & Rawle. Penn. Rep. 500. *Hossack v. Weaver*, 1 Yates, 478. *Cooke v. Darby*, 4 Munfords, 444.

9. Can any act of the carrier divest the general owner of his property in the bailment?

It cannot.—*Kitchell v. Vanedear*, *Blackford's Ind. Rep.* 1 Wils. 8. 1 Johns. Rep. 471.

The court, *Martin, J.*, left the case undecided, whether a sale by a common carrier vests the property in the goods in the buyer.

OF COACH PROPRIETORS, &c.

1. Are proprietors of stage-coaches, whose employment is solely to carry passengers, (such as hackney-coachmen,) deemed common carriers?

They are not.—*Christie v. Griggs*, 2 Camp. R. 79. 2 Kent's Com., Lect. 40, p. 600—602, 3d edit. 1 Bell's Com., p. 467, 468, 5th edit. 1 Bell's Com., § 400, 4th edit. *Aston v. Haven*, 2 Esp. R. 433. *White v. Boulton*, Peake R. 80.

Nor are they responsible for mere accidents happening to the persons of passengers, without any default whatsoever on their part. But they are responsible for the highest degree of care and diligence.—*Camden & Amboy Railroad Company v. Burke*, 13 Wend. R. 615, 627, 628. *Aston v. Haven*, 2 Esp. Rep. 533. *Christie v. Griggs*, 2 Camp. R. 79. *Dudley v. Smith*, 1 Camp. R. 167. *Robinson v. Dunmore*, 2 Bos. & Pull. 417. 2 Kent's Com., Lect. 40, p. 600, 3d edit. *Sharp v. Gray*, 9 Bing. Rep. 457.

2. If the proprietors of a stage-coach for passengers, carry goods also, for hire, are they not, in respect of such goods, to be deemed common carriers?

They are, and responsible accordingly.—2 *Kent's Com.*, Lect. 40, p. 598, 599, 600, 3d edit. *Upshare v. Aidee*, *Comyns' Rep.* 25. *Dwight v. Brewster*, 1 *Pick. R.* 50. *Allen v. Sewal*, 2 *Wend.* 327, 341. *S. C.*, 6 *Wend. R.* 335. *Orange County Bank v. Brown*, 9 *Wend. R.* 85, 114—119. *Hastings v. Pepper*, 11 *Pick. R.* 41. *Camden and Amboy Railroad Company v. Burke*, 13 *Wend. Rep.* 611, 627, 628.

3. Will the mere fact, that the drivers of their coaches are accustomed to carry packages of money, or other things for hire, for their own personal emolument, make the proprietors responsible therefor as common carriers?

It will not; nor will the drivers themselves, in such cases, be personally liable as common carriers, if this is not their common employment, or if they do not hold themselves out to the public to carry generally for hire; but they will be deemed mere ordinary bailees for hire.—*Sheldon v. Robinson*, 7 *New Hamp. Rep.* 157.

The modern doctrine, and the tendency of the modern cases seem to be, to place coach proprietors, in respect to baggage, upon the ordinary footing of common carriers.—*Brooke v. Pickwick*, 4 *Bing. Rep.* 218. 1 *Bell's Com.* 475. *Story's Com.* 324, 325, in the case of the *Orange County Bank v. Brown*, 9 *Wendell's Rep.* 85, it was held after a full discussion, that a common carrier, as in the case of the owner of a steamboat, who carries passengers and their baggage, is responsible for baggage if lost, although no distinct price be paid for its transportation. But where the baggage consists of an ordinary travelling trunk, in which there is a large sum of money, exceeding an amount ordinarily carried for travelling expenses, such money is not considered as included under the term baggage, so as to render the carrier responsible for it.

4. Is not a coach proprietor bound to provide competent vehicles, suitably equipped, and with careful and skilful drivers?

He is.—*Bretheron v. Wood*, 3 *Broad & Bing. Rep.* 54. *Israel v. Clark & Clinch*, 4 *Esp. N. P. Rep.* 259. *Aston v. Haven*, 2 *Esp. N. P. Rep.* 533. *Crofts v. Waterhouse*, 3 *Bing. Rep.* 319. *Christie v. Griggs*, 2 *Campb. N. P. Rep.* 79. *Jackson v. Tollet*, 2 *Starkie's Rep.* 37. 1 *Bell's Com.* 462. 2 *Kent*, 602, 3d edit. *Camden & Amboy Railroad Comp. v. Burke*, 13 *Wend. Rep.* 611, 626—629. *Abbott on Shipping*, p. 3, ch. 3, § 2, 3, 4, 5, 5th edit. *Lyon v. Mells*, 5 *East's Rep.* 428.

5. Is not a coach proprietor answerable for the smallest negligence in himself or his servants?

He is.—*Aston v. Haven*, 2 *Esp. N. P. Rep.* 533. *Christie v. Griggs*, 2 *Campb. N. P. Rep.* 79. *Story's Com.* 379. 1 *Bell's Com.* 562, 5th edit. *White v. Boulton*, *Peake's Rep.* 80. This whole subject was thoroughly examined by the Supreme Court of the United States, in the case of *Stokes v. Saltonstall*, 13 *Rep.* 390, and the opinion of the court delivered by Mr. Justice Barbour, will be found to embrace and to exhaust the learn-

ing applicable to it.—*Camden & Amboy Railroad Com. v. Burke*, 13 *Wend. Rep.* 611, 627, 628.

6. Are not carriers of passengers bound not to overload the coach with passengers or luggage?

They are, and they are to take care that the weight is suitably adjusted, so that the coach is not top-heavy and made liable to overset.—*Long v. Horne*, 1 *Carr. & Payne*, 612. *Aston v. Haven*, 2 *Esp. Rep.* 533. *Herard v. Mountain*, 5 *Petersdorff Abridg. Carriers*, p. 54. 1 *Bell's Com.*, 462, 5th edit.

7. Are not carriers of passengers bound to stop at the usual places, and to allow the usual intervals for refreshment to the passengers?

They are.—1 *Petersdorff Abridg. Carriers*, p. 48, note.

8. If hackney-coachmen are accustomed to carry the baggage of passengers, are they not responsible for due and reasonable care of such baggage?

They are, although they receive no specific compensation therefor, and receive simply their fare for the passengers, their travellers.—*Jones on Bailment*, 94. *Dig. Lib.* 4, *Tit.* 9, 1. 5. 2 *Kent's Com.*, *Lect.* 40, p. 600, 601, 3d edit. *Middleton v. Fowler*, 1 *Salk. Rep.* 282. But see *Schw. N. P.* 323, note *Orange County Bank v. Brown*, 9 *Wend.* 85.

9. Does not the responsibility of coach proprietors carrying passengers, with their baggage, stand (as to the baggage) upon the ordinary footing of common carriers.

Such seems to be the doctrine now firmly established both in England and America.—*Christie v. Griggs*, 2 *Campb. Rep.* 86. *Allen v. Sewell*, 2 *Wend. Rep.* 327, 341. 6 *Wend. R.* 335. *Clarke v. Gray*, 6 *East's Rep.* 564. *Orange Co. Bank v. Brown*, 6 *Wend. Rep.* 85, 114—119. 2 *Kent's Com.*, *Lec.* 40, p. 600, 601, 3d edit. But see *Beekman v. Shouse*, 5 *Rawle's Rep.* 179. *Hollister v. Nowlan*, 19 *Wend. Rep.* 234. *Orange County Bank v. Brown*, 9 *Wend. Rep.* 85. *Camden Company v. Burke*, 19 *Wend. Rep.* 611. *Brooke v. Pickwick*, 4 *Bing.* 218. 4 *Esp. Rep.* 177. 2 *Kent*, 601. *Cole v. Goodwin*, 19 *Wend. Rep.* 251. Mr. Bell has deduced this as the true modern doctrine on the subject.—1 *Bell's Com.* p. 467, 468, 475, 5th edit. 1 *Bell's Com.* § 400, 4th edit.

10. Do the proprietors of a stage-coach warrant the safety of passengers in the character of common carriers?

They do not, nor are they responsible for mere accidents to the persons of the passengers, but only for want of due care.—*Aston v. Haven*, 2 *Esp. N. P. Rep.* 533. *Christie v. Griggs*, 2 *Campb. Rep.* 79. *Crofts v. Waterhouse*, 3 *Bing. Rep.* 321. In *Boyce v. Anderson*, 2 *Peters' U. S. Rep.*, 150, it was decided, that the law regulating the responsibility of common carriers did not apply to the case of carrying human beings, such

as negro slaves. The reason and policy of the rigid rule at the common law, which governs the carriage of inanimate property, were deemed not to apply.—2 *Kent*, 601, 3d edit.

11. Will not slight fault, unskilfulness, or negligence, either as to the competence of the carriage, or the act of driving it, render the owner responsible in damages for any injury to the passengers?

It will.—*Wordsworth v. Willan*, 5 *Esp. N. P. Rep.* 273. *Mahew v. Boyce*, 1 *Starkie's Rep.* 423. *Jones v. Boyce*, *Starkie's Rep.* 493. *Jackson v. Tollett*, 2 *Starkie's Rep.* 37. *Dudly v. Smith*, 1 *Campb. Rep.* 167. *Israel v. Clarke & Clinch*, 4 *Esp. N. P. Rep.* 259. *Sharp v. Gray*, 9 *Bing. Rep.* 457.

12. Is the owner of a stage-coach used for carrying passengers, liable for an injury sustained by the passengers by the upsetting of the coach?

Not unless the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage. But where a stage-coach is upset and a passenger is injured, it is *prima facie* evidence that there was carelessness or negligence or want of skill upon the part of the driver, and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.—*Stokes v. Saltonstall*, 13 *Peters' S. C. Rep.* 181.

13. If a driver is a person of competent skill, and an accident occurs by physical disability arising from extreme and unusual cold, which renders him incapable for the time to do his duty, is the owner liable?

He is not in such a case.—*Stokes v. Saltonstall*, *Ibid.* 181.

14. Are not coach proprietors answerable as common carriers, for the baggage of the passengers?

Yes; unless lost by inevitable accident or through the act of public enemies.—*Cole v. Goodwin*, 19th *Wendell's Rep.* 234.

15. Are not common carriers absolved from the consequences of a loss not occasioned by negligence or misconduct?

They are, where the owner is chargeable with fraud in the representation of the nature or value of the property, materially affecting the degree of care necessary to be bestowed, or the premium to be paid to the carrier, etc.—*Cole v. Goodwin*, 19th *Wendell's Rep.* 251.

16. Does the fact that the owner is present or sends his servant to look after the property, alter the case?

It does not, where there is no fraud on the part of the owner.—*Hollister v. Nowlan*, 19 *Wend. Rep.* 224. *Robinson v. Dunmore*, 2 *Boss. & Pull.* 418.

17. Can stage-coach proprietors and other common carriers, restrict their common law liability, by a general notice that the *baggage of passengers is at the risk of the owners*?

They cannot, or at all events only by an express contract; a contract cannot be implied or inferred from a general notice, though brought home to the knowledge of the owner of the property.—*Hollister v. Nowlan*, 19 *Wend. Rep.* 234. *Robinson v. Dunmore*, 2 *Boss. & Pull.* 418.

18. Is there any distinction between mails and other coaches as to their liability?

None at all.—*Whitfield v. Lord Le Despenser*, *Cowp.* 754. *Rowning v. Goodchild*, 3 *Willes*, 443, *Lord Kenyon*. *White v. Bolton*, *Peck*, 113. *Harris v. Coster*, 1 *Car. & Payne*, 636. *Vide Terence's Law of Carriers*, p. 12. 5 *Petersdorff Abridg.* 61, *note*. But post-masters and deputy post-masters are not liable as common carriers.—*Lane v. Cotton*, *et al.* 1 *Salk.* 17. 1 *Lord Raymond*, 664, *S. C.*

19. How is a waggoner held for a loss by accident on the road?

He is held only to ordinary diligence. ——— *v. Jackson*, 1 *Hayn. N. Caro. Rep.* 14.

20. May not a common carrier, like other insurers, demand a premium, proportioned to the hazards of his employment?

He may; and if the owner give an answer false in a material point, the carrier will be absolved from the consequences of a loss not occasioned by negligence or misconduct; but in such case *actual notice* of the requirements of the carrier must be brought home to the knowledge of the owner of the goods.—*Hollister v. Nowlan*, 19 *Wendell's Rep.* 234.

OF NOTICE AND THE EFFECT THEREOF.

1. Is a *general notice*, posted up in the stage-coach office, and other places, sufficient to subject the owner to a charge of *fraud*?

It is not.—*Hollister v. Nowlan*, *Wendell's Rep.* 234.

2. What is the only safe course for a carrier, in such a case?

It seems to be this; that he should announce his terms to every individual who applies at his office, and at the same time place in his hands a printed paper specifying such terms.—*Hollister v. Nowlan*, 19 *Wendell's Rep.* 234.

3. Must not the notice, in order to be available to the carrier, be brought clearly to the knowledge of the party with whom he deals?

It must.—*Davis v. Willan*, 2 *Stark. N. P. C.* 279. *Clarke v.*

Gray, 4 *Esp. N. P. C.* 177. The vendor had sent goods by a carrier, who had limited his responsibility, and *Lord Ellenborough* held that the vendee was bound, although he did not know of the limitation of the carrier.—*Maving v. Todd*, 1 *Stark. N. P. C.* 72.

So, also, an agent is bound by the limited responsibility of the carrier, who had given due notice to the principal, of which the agent knew nothing.—*Mahew v. Ames*, 3 *B. & C.* 601. *Alfred v. Horne*, 3 *Stark. N. P. C.* 136.

4. Will notice limiting the carrier's responsibility, hung up, or nailed up, on the carrier's door, or in his office, be sufficient for those who cannot read?

It will not.—*Davis v. Willan*, 2 *Stark. N. P. C.* 53. Or when in fact a person can, but does not read it.—*Kerr v. Willan*, 2 *Stark.* 53. Nor have these notices any effect where the carrier sends round carts, and receives the goods from the owners.—*Clayton v. Hunt*, 3 *Camp. N. P. C.* 27. *Evans v. Soule*, 2 *M. & Selw.* 1. *Gibbon v. Paynton*, 4 *Burr. R.* 2302. *Keeper v. Willan*, 2 *Stark.* 53. *Davis v. Willan*, 2 *Stark. R.* 279. *Clayton v. Hunt*, 3 *Camp. R.* 27. *Butler v. Hearne*, 2 *Camp. R.* 415.

5. Is a notice of any avail, if the carrier sends the goods by a different conveyance?

None at all.—*Barnwell v. Hussey*, 1 *Const. S. Ca. Rep.* 114.

6. How is the advertisement of stage owners, that all baggage is at the risk of the owners, applicable?

It is only applicable to the baggage of passengers. It is not necessary to inform the carrier what a package contains, it being no violation of law for a mail-carrier to carry bank-notes, &c.—*Dwight v. Brewster*, 1 *Pick. Mass. Rep.* 50.

7. Where the party reads the notice, and it is fully brought home to his knowledge, is not the common law liability of the carrier limited according to the notice?

It is.—*Clayton v. Hunt*, 3 *Camp. N. P. C.* 28. *Butler v. Hearne*, 2 *Camp. N. P. C.* 415. *Colden v. Bolton*, 2 *Camp. N. P. C.* 107. *Butler v. Hearne*, 2 *Camp. R.* 415, 554. But see note (3) and the case there cited, especially *Hollister v. Nowlan*, 19 *Wend. R.* 234. *Cole v. Goodwin*, 19 *Wend. R.* 251.

8. If the notice is published in a newspaper, is it sufficient?

It is not, unless accompanied by some evidence.—*Rowley v. Horne*, 3 *Bing.* 2. *Munn v. Baker*, 2 *Stark. R.* 225. *Leeson v. Holt*, 1 *Stark. R.* 186.

9. Where a carrier gives two notices, by which will he be bound ?

By that which is least beneficial to himself.—*Murray v. Baker*, 2 Stark. N. P. C. 225. *Munn v. Baker*, 2 Stark. R. 255. *Cobden v. Bolton*, 2 Camp. R. 108.

10. Must not a notice limiting the responsibility of a carrier be published to the world ?

It must, and must be unequivocal, so as not to admit of ambiguity.—*Butler v. Hearne*, 2 Camp. 414. And if any doubt arise as to its construction, it will be construed as containing the whole of the limitations the carrier intends to put on his common law responsibility.—*Cobden v. Bolton*, 2 Camp. N. P. C. 108. In promulgating notice to the world, that he would not be liable for losses and damages, the court held that the notice covered a loss by a robbery.—*Covington v. Willan*, 1 Gou. N. P. C. 115.

11. Does not a notice known by the principal, bind him in respect to all his agents, who send goods by the same carrier ?

It does ; and on the other hand, a notice known to the particular agent who sends goods, binds the principal in respect to such goods, notwithstanding the principal is personally ignorant of the notice.—*Carr & Payne*, 550. *Maving v. Todd*, 1 Stark. R. 72. *Clarke v. Hutchins*, 14 East's R. 475. *Mayhew v. Eames*, 3 Barn. & Cress. 601.

For further information respecting carriers' notices, see the following cases.—*Rowley v. Horne*, 10 Moor, 247. 3 Bing. 2 S. C. *Beck v. Evans*, 16 East, 243. 3 Camp. 267, S. C. *Wilson v. Freeman*, 3 id. 527. *Levi v. Waterhouse*, 1 Price, 280. *Low v. Booth*, 13 ib. 329. *Down v. Fromont*, 4 Camp. 40. *Munn v. Baker*, 2 Stark. Rep. 255. *Gougher v. Jolly*, 1 Holt, N. P. Rep. 317. *Cobden v. Bolton*, 2 Camp. 108. *Marsh v. Horne*, 5 Barn. & Cress. 322. *Garnett v. William*, 5 Barn. & Ald. 53. *Sleat v. Fagg*, id. 342. *Bradley v. Waterhouse*, 2 Car. & Payne, 318. *Macklin v. Waterhouse*, 2 Moor & Payne, 319, and *Liley v. Horne*, id. 331, both these cases reported in 5 Bing. 217, under the title of *Riley v. Horne*. *Roscell v. Waterhouse*, 2 Stark. 461. *Hutton v. Bolton*, 2 Doug. 59. *J. H. Black*, 299, S. C. note. *Kerr v. William*, 6 Maule & Selw. 150. 2 Stark. R. 53. S. C. *Davis v. William*, 2 Stark. R. 279. *Alfred v. Horn*, 3 id. 136. *Clayton v. Hunt*, 3 Camp. 27. *Butler v. Hearne*, 2 id. 415. *Bodenham v. Bennot*, 4 Price, 31. *Mayhew v. Eames*, 3 Barn. & Cress. 601. *Clay v. Willan*, 1 H. Black. 298. *Batson v. Donovan*, 4 Barn. & Ald. 21. *Thorogood v. Marsh*, 1 N. Gow. 105. *Covington v. Willan*, id. 115. *Bignola v. Waterhouse*, 1 Maule & Sel. 255. *Riley v. Horne*, 5 Bing. 217. *Newborn v. Just*, 2 Carr & Payne, 76. *Brook v. Pickwick*, 4 Bing. 218.

CAVEAT.

1. In cases in which the regular remedy is by *caveat*, may a court of equity entertain jurisdiction, under circumstances which render its interposition just and proper?

It may, but such circumstances must be made to appear to the satisfaction of the court.—*Depew v. Howard & Wife*, 1 *Munford's Rep.* 293. For more on *Caveat*, see *Pleading and Practice*.

CHANCERY.

1. What is chancery or the high court of chancery?

Chancery or the high court of chancery is the highest court of judicature in this kingdom, next to the parliament, and of very ancient institution. The jurisdiction of this court is of two kinds; ordinary and extraordinary. The ordinary jurisdiction is that wherein the lord Chancellor, lord Keeper, &c., in his proceedings and judgments, is bound to observe the order and method of the common law; and the extraordinary jurisdiction is that which this court exercises in cases of equity.

The ordinary court holds pleas of recognizances, acknowledged in the chancery, writs of *scire facias* for repeal of letters patent, writs of partition, &c., and also of all personal actions, by or against any officer of the court, and by acts of parliament of several offences and causes. All original writs, commissions of bankruptcy, of charitable uses and other commissions, as idiots, lunacy, &c., issue out of this court, for which it is always open; and sometimes a supersedeas, or writ of privilege, hath been here granted to discharge a person out of prison. A *habeas corpus*, prohibition, &c., may be had from this in the vacation; and here a subpoena may be had to force witnesses to appear in other courts, where they have no power to call them.—4 *Inst.* 79. 1 *Danv. Abr.* 776.

GROUNDS OF JURISDICTION.

1. What are the general heads of jurisdiction in the courts of chancery?

1. To relieve from accident and mistake.
2. To decree an account between partners.
3. To investigate all matters of fraud.
4. To protect the rights of infants, married women, lunatics, &c.
5. To compel the specific performance of agreements.
6. To enforce the execution of all trusts express or implied.

In the exercise of its powers it is governed by the following maxims.

1. He that will have equity done to him must do it to the same person.
2. He that hath committed iniquity shall not have equity.

3. Equality is equity.
4. It is equity that he should make satisfaction, who received the benefit.
5. It is equity that he should have satisfaction, who sustained the loss.
6. Equity suffers not a right to be without remedy.
7. Relieves against accidents.
8. Interferes to prevent mischief.
9. Prevents multiplicity of suits.
10. Regards length of time.
11. Will not suffer a double satisfaction to be taken.
12. Suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made.
13. It regards, not the circumstances, but the substance of the act.
14. Where equity is equal, the law must prevail.

2. If a person indebted to several others, absent himself from the state, and leave real estate to which he is entitled in equity, but no property subject to legal process, may not the creditors unite in a bill, in chancery, to have their claims liquidated, and to make the property liable for the amount ?

They may.—*Kieffer v. Glancey*, 2 *Blackf.* 356.

3. Will not a court of chancery relieve against mistakes in the drawing of deeds ?

It will ; and even if, by accident or fraud, they are not drawn according to the agreement of the parties.—*Sanford v. Washborn*, 2 *Root*, 499.

4. Will not a court of equity reform an instrument which, by the mistake of the drawer, admits of a construction inconsistent with the true agreement of the parties ?

It will ; even though the party seeking to reform it, himself drew the instrument.—*Bull v. Storie*, 1 *Sim. & Stew.* 310.

5. Has the court of chancery jurisdiction in all cases where a discovery is wanting ?

It has.—*Pryor v. Adams*, 1 *Call*, 382. *Avery v. Holland*, 2 *Tenn. Rep.* 77.

6. To give a court of equity jurisdiction on the ground of discovery, is it sufficient to charge that certain facts are known to the defendants, and ought to be disclosed by them ?

It is not ; but it should be averred that the plaintiff is unable to prove such facts by other testimony.—*Duvals v. Ross*, 2 *Munf.* 290. *Bass v. Bass*, 4 *Hen. & Munf.* 478. *Emerson v. Staton*, 3 *Monro*, 117.

7. If a bill seeks discovery in aid of the jurisdiction of a court of law,

must it not appear that such aid is clearly necessary, and the discovery material to the defence?

It must; for when the facts depend on the testimony of witnesses, and the court of law can compel their attendance, chancery will not interpose.—*Gelston v. Hoyt*, 1 *Johns. Ch.* 543.

In Kentucky, it is a good ground of equitable jurisdiction, that the defendant had obtained a prior patent for land, to which the complainant had a better right, under the statute respecting lands; and in exercising that jurisdiction, the court will decide in conformity with the settled principles of a court of chancery.—*Bodley et al. v. Taylor*, 227.

A defendant in equity, who has obtained a patent for land, not included in his entry, but covered by the complainants' entry, will be decreed to convey it to the complainants; but the complainants will not be required to convey to the defendant the land which they have obtained a patent for, which was covered by the defendant's entry, but which, by mistake, he omitted to survey.—*Ibid.*

8. Will a court of equity annul a contract, which the defendant has failed to perform, and cannot perform, on his part?

It will.—*Skillern's Exrs. v. May's Exrs.* 2 *Cond. Rep. of S. C. of United States*, 56.

9. If an account stated, be pleaded in bar to a bill in equity, will such plea be sustained?

It will, except so far as the plaintiff shall show it to be erroneous.—*Chappedelaine et al. v. Decheneaux*, *Ibid.* 116.

10. Can the property of a debtor, fraudulently conveyed away, be reached by a bill in equity against the holder, until a judgment has been obtained against the debtor?

It cannot.—*Duberry v. Clifton*, *Cook*, 338. *Beck v. Burdel*, 1 *Paige*, 305. *Hendrick v. Robinson*, 2 *Johns. Ch. Ca.* 296. *M'Kinley v. Combs*, 1 *Monro*, 106.

It is a rule in equity, that a judgment creditor at law is entitled to redeem an encumbrance upon land, and thereby secure his legal priority.—*United States v. Sturges*, 1 *Paine*, 525.

11. Has not chancery power to assist a judgment creditor to discover and reach the property of a debtor, which is beyond the reach of an execution at law?

It has.—*M'Dermott v. Strong*, 4 *Johns. Ch.* 687.

Where a person has mortgaged, or otherwise subjected property to the payment of specific debts, equity will not permit such debtor to be harassed by the creditor of his creditor, until the disposition of the subjected property is shown, and a deficiency.—*Marshall v. Tenant*, 2 *J. J. Marsh.* 156.

12. If a debtor has abandoned the country, and left effects in the possession of others, will not a court of equity entertain jurisdiction of the case?

It will, and afford the appropriate relief.—*Moore v. Simpson*, 5 *Little*, 49.

13. Must the construction of a letter of credit, or of guaranty, be the same in a court of equity as in a court of law?

It must; and any facts which might be introduced into one court to explain the transactions, may be introduced into the other.—*Russel v. Clark's Exrs.*, *Ibid.*, 417.

Where the only ground of equitable jurisdiction is the discovery of facts solely within the knowledge of the defendant, and the defendant by his answer discloses no such facts, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the plaintiff should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.—*Ibid.*

A merchant, who endorses the bills of another upon the guaranty of a third, cannot, upon the insolvency of the principal debtor and of the guarantee, resort to a trust fund, created by the principal debtor for the indemnity of the guarantee, for the amount which the guarantee should pay. But the person for whose benefit a trust is created, who is to be the ultimate receiver of the money, may sustain a suit in equity to have it paid directly to himself.—*Ibid.*

When the guarantee is insolvent, a court of equity will not decree the money raised for his indemnity to be paid to him, without security that the debt to the principal creditor should be satisfied.—*Ibid.*

There may be cases in which relief ought to be extended to a person who might have defended, but has omitted to defend himself at law, but such cases do not frequently occur. The equity of the application must be free from doubt.—*Ibid.*

Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself in a court of law, or of which he could have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agent, will justify an application to a court of chancery.—*Ibid.*

14. If an equitable title be merged in a grant, has the party relief in equity?

He has not, although the grant be void, as being contrary to law.—*Preston v. Trembe*, 2 *Condensed Rep.* 528.

15. Have courts of chancery concurrent jurisdiction with courts of law, in cases of dower?

They have, especially where partition, discovery, or account, is prayed, and in case of a sale, where the parties are willing that a sum in gross should be given in lieu of dower.—*Herbert et al. v. Wren & Wife et al.*, *Ibid.* 534.

16. Will the aid of a court of chancery be given to either party who claims specific performance of a contract ?

It will, if it appear that in good faith, and within proper time, he has performed the obligations which devolved upon him.—*Watts v. Waddle, Ibid*, 389.

The acts of Maryland, regulating the proceedings on injunctions and other chancery proceedings, and giving certain effects to them in courts of law, are of no force in relation to the courts of the United States. The chancery jurisdiction given by the constitution and laws of the United States, is the same in all the states of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice, but the act of congress, 1792, chap. 36, has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages, which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from courts of law ; subject, of course, to the provisions of the act of congress, and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may from time to time prescribe.—*Boyle v. Zacharie & Turner, Ibid*, 648.

Where a plaintiff sues in chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency in quantity (relating to which deficiency he prays a discovery), but according to the contract appears entitled to compensation in money, and not in lands, the court, after decreeing the first mentioned conveyance, the deficiency and the sum to be allowed for it being ascertained, will go on to decree the compensation, without turning over the party to a court of law.—*Chinn v. Heale, 1 Munford's Rep.* 63.

In cases where it is proper and necessary to go into equity for a discovery, the court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a court of law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law.—*Chichester's Exrs. v. Vass's Administrators, Ibid*, 98.

OF BILLS, ANSWERS, &c.

1. May complainant, on hearing, discontinue as to part of the land claimed by his bill ?

He may.—*Grubbs v. Lipscomb, 2 Bibb*, 407.

The principle has been well established and generally sanctioned in courts of equity, that by analogy the statute of limitations is a bar to an equitable right, when at law it would have operated against a grant.—*Miller v. McIntire, 6 Peters' Rep.* 61.

At law the statutes operate where conflicting titles are adverse in

their origin, and no reason is perceived against giving the statute the same effect in equity.—*Ibid.*

In a suit for contribution, against legatees or distributees, the executor or administrator, or if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party ; unless it appears that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees.—*Hooper & Wife v. Royster & Wife, Ibid, 119.*

2. Is an answer in chancery (though in form responsive to a question put in the bill) evidence where it asserts a right *affirmatively* in opposition to the plaintiff's demand ?

It is not ; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill.—*Paynes v. Coles, Ibid, 373.*

A decree dismissing so much of a bill as claims one of two separate subjects in controversy, and as to the other, determining the rights of the parties, but directing an account to be taken, is not final in any respect between the parties retained in court and their legal representatives, but subject to revision and alteration in every part, at any time before a final decree ; without the necessity of a bill of review.—*Templeman v. Step-toe, 1 Munford's Rep. 339.*

If the plaintiff call upon the defendant as assignee of a bond, to say whether he had notice of the consideration thereof when he received the money due thereon, and in his answer, he say he had no such notice when he took the assignment, the answer is not to be considered as admitting notice at the time of receiving the money.—*Edgar v. Donnally and Jones, 2 Munford's Rep. 387.*

3. On an appeal on whom does the burthen lie ?

It lies upon the appellant, and if not he must show the order appealed against him to be clearly wrong.—*Lloyd v. Trimleston, 2 Moll. 81.*

4. Is a demurrer to the bill, signed by the attorney general of a state, a sufficient appearance by such state, in a suit brought against it ?

It is.—*State of New Jersey v. State of New York, 6 Peters' R. 323.*

5. Where a bill is filed against husband and wife, is not the husband to enter a joint appearance, and put in a joint answer for both ?

He is.—*Levit v. Cruger, 1 Paige, 421.*

6. Can infants appear and answer otherwise than by their guardians appointed for that purpose ?

They cannot ; and it is erroneous to proceed against them until such appointment.—*Jones v. Crist, 3 A. K. Marsh, 143. Bradwell v. Weeks, 1 John. Ch. 325. Henderson v. Harper, 170.*

7. If the sheriff neglects to return an attachment by the return day?

Then an attachment may be issued against him.—*People v. Elmer*, 2 *Paige*, 85.

8. May not an attachment be issued to compel the performance of a decree in equity?

It may.—*Armstrong v. Beaty*, *Cam. & Nor.* 33.

9. For what will an attachment for contempt lie in disobedience of a decree of a chancery court?

It will only lie for disobedience of what is decreed, and not for what may be decreed.—*Taliaferro v. Horde's Admr.* 1 *Rand*, 242.

10. May not a plaintiff, by an amended bill, introduce new matter which occurred prior to filing of the original bill, in order to fortify his case?

He may; but he cannot introduce matter which occurred subsequently to the filing of the original bill without a supplemental bill. And the defendant having, in his answer to the amended bill, stated this objection to the new matter, and insisted upon the same advantages as if he had demurred or pleaded thereto, and the plaintiff not being able to support his case upon the evidence which referred to the allegations of the original bill, the bill was dismissed with costs.—*Wray v. Hutchinson*, 2 *Milne & Keene*, 235.

11. May not a bill be amended by adding plaintiffs, notwithstanding the defendants have answered?

It may.—*Hichens v. Congrave*, 1 *Sim.* 500.

12. Can an original bill be amended by incorporating therein any thing which arose subsequent to the commencement of the suit?

It cannot; this should be stated in a supplemental bill.—*Stafford v. Howlett*, 1 *Paige*, 200.

13. May not a court of equity allow an amendment of a bill after deciding against the bill and allowing a demurrer on argument?

It may.—*Hunt v. Admrs. of Rousmaniere*, 2 *Mason*, 342.

14. May not the plaintiff after special demurrer to a bill, have full leave to amend?

He may, on payment of costs.—*Rose v. King*, 4 *Hen. & Munf.* 375.

15. May not a bill in equity be amended on payment of costs?

It may, after demurrer for want of parties and argument.—*Marshall v. Loveless*, *Cam. & Nor.* 239, 264. *Benszein v. Loveless*, *Stu.* 520.

16. When a bill of review alleges new matters which are denied by the answer, will it not be dismissed at the hearing?

It will; unless the plaintiff proves the new matters, and that they were discovered after the decree was made.—*Barnett v. Smith*, 6 *Call*, 98.

17. What does a plea or a special replication admit?

It admits fully every point that it does not put in issue.—*Mitf. on Pl.* 300, 321.

Formerly a plea of the statute of frauds was held to admit the agreement against which it was pleaded as a bar, and so of the statute of limitations: but now even when the answer admits it, pleading the statute, the answer is immaterial.—*See Mitf. on Pl.* 265.

18. Does an appeal lie from an interlocutory order, such as does not put a final end to the case, or establish any principle which will finally affect the merits of the case, or deprive the party of any benefit he may have at the final hearing?

It does not.—*Robertson v. Bingley*, 1 *M'Cord's Ch.* 333, 351. *Berryhill v. M'Kee*, 3 *Yerg.* 157. *Gibson v. Randolph*, 2 *Munf.* 310. *Allen v. Belches*, 2 *Hen. & Munf.* 595. *Daniels v. Taggart's Admrs.*, *Gill. & Johns.* 311.

19. Can a party appear on a mere question of costs?

He cannot.—*Lewis v. Wilson*, 1 *M'Cord's Ch.* 210.

20. Is an error in an interlocutory decree, where a final decree has been subsequently made, without such error being urged upon ground of appeal or reversal?

It is not.—*Ballit's Heirs v. Thorp*, 1 *A. K. Marsh*, 604. *Ashly v. Kiger*, 3 *Rand.* 165. *Lyles v. Lyles*, 1 *Hill's Ch.* 76, 92. *Corneter v. Ewing*, 1 *Moll.* 19.

21. Can chancery grant appeals from interlocutory decrees in vacation?

It cannot, but in court only.—*William & Mary College v. Hodgson*, 2 *Hen. & Munf.* 557. *Dawney v. Wright, Marsh*, 12.

22. Can consent or long acquiescence give the court of appeals jurisdiction?

It cannot; therefore an appeal having been improvidently granted, was dismissed on motion five years after it was entered on the docket.—*Clark v. Carns*, 1 *Munf.* 160. *Blakey v. West*, *Rand.* 75. *M'Call v. Peachy*, 1 *Call*, 55. *Grimes v. Pendleton*, 247.

23. Where a question is, which of two funds shall bear the costs, where does an appeal for the costs lie?

It lies, where the costs are the whole question ; and the object of the motion is to ascertain, by whom they are to be payed.—*Malone v. Clark*, 1 *Moll.* 15. *Reardon v. Hodgens*, 2 *Moll.* 381.

24. May not the chancellor grant an appeal from his own decree during the term ?

He may, if allowing the appellant time to give security after the expiration of the term.—*Stealey v. Jackson*, 1 *Rand.* 413.

25. May not one of several against whom a decree of judgment is rendered appeal ?

He may ; such an appeal brings up the whole case and the appellant is liable for the whole, by his appeal bond.—*Johnson v. Johnson's Heirs*, 1 *Dana*, 366.

26. Can a person, not a party or representative of a party in the court below, present or join in a petition of appeal ?

He cannot, even though he may have an interest in the question.—*Corporation of Ludlow v. Greenhouse*, 1 *Bligh N. S.* 17.

27. What if a bill of review, showing just cause, be offered and refused by the chancellor ?

Then, an appeal lies before the court of appeals.—*Lee v. Braxton*, 5 *Call*, 459.

28. Is not the right of appeal in equity, limited to final decrees or to orders involving the merits ?

It is, and it does not extend to such orders as are merely interlocutory, or to decrees by consent or default.—*Ringgold's case*, 1 *Bland*, 5, 12. *Skye v. Llewellen*, *Wend.* 18. *M'Kim v. Thomson*, *Wend.* 270.

29. If an objection to the interest of a witness be not made at the hearing in the court below, can it be made in this court ?

It cannot.—*Respass v. Morton*, *Hard.* 226.

30. Can depositions read on the trial in the court below, without objection, be rejected in the appellate court ?

They cannot.—*Johnson v. Rankin*, 3 *Bibb*, 87.

31. If the appellant wishes to offer new evidence, should he not, in his petition of appeal, ask leave to produce further proofs ?

He should, and even state his excuse for not producing such evidence in the court below.—*Respass v. Morton*, *Hard.* 424. *Conn v. Penn*, 5 *Wheat.* 424.

32. Ought not the parol testimony, which is heard at the trial in the court below, to appear in the record, in appeals to the supreme court of the United States from the circuit courts, in chancery cases?

Most certainly it ought.—*Conn v. Penn.*, 5 *Wheat.* 424. *Scribner v. Williams*, 1 *Paige*, 550.

33. Is it necessary that the appellant should himself execute the appeal bond, upon an appeal from the chancellor or vice-chancellor?

It is not, it is sufficient if the bond be executed by two sufficient sureties.—*North American Coal Co. v. Dyott*, 4 *Paige*, 273.

34. Can the court of chancery correct, on motion or by bill of review, any error apparent on the face of the proceedings, in a decree which has been affirmed by the court of appeals?

It cannot.—*Campbell v. Price*, 3 *Munf.* 227.

35. May not a party on appeal, examine the whole case, and open for consideration all prior or interlocutory orders or decrees, any way connected with the merits of the decree from which he has appealed, where there has been no final judgment in a cause?

They may, and this, too, notwithstanding such orders or decrees may have been affirmed by the appeal court.—*Price v. Nesbit*, 1 *Hill's Ch.* 453.

For more of Chancery practice, see Pleading and Practice, where the subject is more fully treated of.

CONFESSION.

1. Where two defendants have appeared and pleaded an entry in the record that the parties came, &c., and the defendant L acknowledged the plaintiff's actions, and therefore judgment against the said defendant; must it be understood as a judgment against both on the confession of one?

It must, and therefore erroneous.—*Ward v. Johnston*, 1 *Munford's Rep.* 45.

2. In reversing the judgment for that error, ought the court to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other?

It ought.—*Ibid.*

In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security; and it appearing by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party), that a stay of execution should be allowed the principal; the court, in reversing the judg-

ment, ought to have given the security leave to plead *pais darrein continuance*, all the proceedings having been brought up by a writ of *superseas*.—*Ward v. Johnston, Ibid, 45. For Confession of Judgment, see Judgment by Confession.*

CONSENT.

1. Shall a mortgagee without notice be protected against a prior equitable right?

He shall; if the person having such title either encourage him to take the mortgage, or knowing of his intention to take it, stood by and made no objection.—*Green v. Price, 1 Munford's Rep. 149.*

CONSIDERATION.

1. Is *gross inadequacy* of consideration, a circumstance from which fraud may be presumed in a court of equity?

It is.—*Whiteborn & Wife v. Hines et al., 1 Munford's Rep. 557.*

CONSTRUCTION OF THE STATUTES OF THE UNITED STATES.

1. What have Congress declared to be the law, in regard to priority of payment over private creditors, in cases of insolvency, and in the distribution of the estates of deceased debtors?

Congress have declared by law, that the United States were entitled to priority of payment over private creditors, in all cases whatsoever.—*1 Kent's Com. 242.*

2. Have, or have not Congress a right of pre-emption to all Indian lands lying within the territories of the United States?

They have.—*Kent's Com. 257.*

3. Do, or do not the United States possess the legal title to the soil, as well as the right of jurisdiction, subject to the Indian title of occupancy?

Yes; and with an absolute and exclusive right to extinguish the Indian title of occupancy, either by conquest or purchase.—*Ibid.*

Indictments under the third section of the act for the punishment of certain crimes against the United States, &c., passed April 20th, 1818, the indictment charged the defendant with being knowingly concerned in the fitting out in the port of Baltimore, a vessel with intent to employ her in the service of a foreign "people," the United Provinces of Buenos Ayres,

against the subjects of the emperor of Brazil, with whom the United States were at peace. The vessel went from Baltimore to St. Thomas, and was there fully armed. She afterwards cruised under the Buenos Ayrean flag. To bring the defendant within the words of the act, it is not necessary to charge him with being concerned in fitting out and arming the vessel, the words of the act are "fitting or arming." Either will constitute the offence. It is sufficient if the indictment charge the offence in the words of the act.—*The United States v. Quincy*, 6 *Peters' Rep.* 445.

It is true, that with respect to those who have been denominated at the bar the chief actors, the law would seem to make it necessary that they should be charged with fitting out and arming. The words may require that both shall concur; and the vessel be put in condition to commit hostilities, in order to bring her within the law; but an attempt to fit out and arm is made an offence. This is certainly doing something short of complete fitting out and arming.—*Ibid.*

To attempt to do an act does not, either in law, or common parlance, imply a complexion of the act or any definite progress towards it. Any effort or endeavor to effect, will satisfy the terms of the law. It is not necessary that the vessel, when she left Baltimore for St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment.—*Ibid.*

The offence consists principally in the intention with which the preparations to commit hostilities were made. These preparations, according to the very terms of the act, must be made within the limits of the United States; and it is equally necessary that the intention with respect to the employment of the vessel, should be formed before she leaves the United States. And this must be a fixed intention; not conditional or contingent, depending on some future arrangements. This intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn; and decides whether the adventure is of a commercial or warlike character.—*Ibid.*

4. Does the law prohibit armed vessels belonging to the citizens of the United States from sailing out of our ports?

It does not; it only requires the owners to give security that such vessel shall not be employed by them to commit hostilities against foreign powers at peace with the United States.—*Ibid.*

5. Are collectors authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States?

They are not; unless circumstances shall render it probable that such vessels are intended to be employed by the owners to commit hostilities against some foreign power at peace with the United States. All the latitude, therefore, necessary for commercial purposes is given to our citizens; and they are restrained only from such acts as are calculated to involve the country in war.—*Ibid.*

If the defendant was knowingly concerned in fitting out the vessel

within the United States, with intent that she should be employed to commit hostilities against a state, or prince, or people at peace with the United States, that intention being defeated by what might afterwards take place in the West Indies, would not purge the offence which was previously consummated. It is not necessary that the design or intention should be carried into execution, in order to constitute the offence.—*Ibid.*

The indictment charges that the defendant was concerned in fitting out the Bolivar, with intent that she should be employed in the service of a foreign *people*; that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata, had been regularly acknowledged as an independent nation by the executive department of the government of the United States, before the year 1827. It was argued that the word *people*, is not applicable to that nation or power. By the court: the objection is one purely technical, and we think not well founded. The word *people* as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power.—*Ibid.*

6. What credit is given to a judgment in a state, other than that in which it was rendered?

If a judgment duly authenticated has, in the state court, from whence it is taken, the faith and credit of the highest nature: viz., record evidence, it must have the same faith and credit in every other court.—1 *Kent*, 260.

7. Have Congress power to call out the militia, and to what extent?

They have; reserving to the states the appointment of the officers.—1 *Kent*, 262.

8. Who is the commander of the militia when called into service?

The president of the United States.—*Ibid.*

Upon the true interpretation of the provision in the sixty-fifth section of the Duty Collection Act of 1799, c. 128, relative to granting judgment on motion, in suits on bonds to the United States for duties, the legislature intended no more than to interdict the party from an imparlance or any other means or contrivances for mere delay. He should not, by sham pleadings, or other pretended defences, be allowed to avail himself of a postponement of the judgment, to the injury of the government, or in fraud of his obligation to make a punctual payment of the duties when they had become due. There is no reason to suppose that the legislature meant to bar the party from any good defence against the suit, founded upon real and substantial merits. And such an intention ought not, in common justice, to be presumed without the most express declarations.—*Ex parte Davenport*, 6 *Peters' Rep.* 661.

The language of the sixty-fifth section neither requires nor justifies any such interpretation. It merely requires that judgment should be rendered at the return term, unless delay shall be indispensable for the obtainment of justice.—*Ibid.*

The grant of the King of Spain, to F. M. Arredondo and Sons, for land at Alachua, in Florida, gave a valid title to those claimants under the grant, according to the stipulations of the treaty between the United States and Spain, of 1819, the laws of nations, of the United States, and of Spain. —*The United States v. Arredondo and others*, *Ibid*, 691.

CONTRACTS.

DEFINITION OF A CONTRACT.

1. What is a contract ?

It is an agreement, upon sufficient consideration, to do or not to do a particular thing.

Or, it is a covenant or agreement between two or more persons, with a lawful consideration or cause.

It has also been defined to be an agreement between two or more persons, to do an act, whereby the parties are bound mutually to each other, or one is bound to the other.—2 *Blackstone's Com.* 442. *Summer v. Williams et al.*, 8 *Mass. Rep.* 178. *West. part 1.* *S. P. Packard v. Richardson et al.*, 17 *Mass. Rep.* 131. *McCulloch v. Eagle Ins. Co.* 1 *Pick.* 281.

A contract is also defined to be an agreement entered into by two or more persons, whereby one becomes bound to another to perform, or abstain from doing a particular thing.—6 *Petersdorff's Abr.* 184.

The definition in the *Code Napoleon*, No. 1101, says, that “a contract is an agreement by which one or more persons bind themselves to one or more others, to give, to do, or not to do something. This definition is essentially the same with that in *Pothier, Traité des Oblig.* No. 3.

2. Is not a contract either executory or executed ?

It is. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. A contract executed is one in which the object of contract is performed.—*Fletcher v. Peck*, 6 *Cranch*, *U. S. Rep.* 136. (*Cox's Dig.*, p. 192. *United States v. Goods per Susquehanna*.)

3. Is not a contract either special or parol ?

It is.—*Ballard v. Walker*, 3 *Johns. N. Y. Cas.* 60. *Per Cur. Kent, J.* All contracts by the laws of England, are distinguished into agreements by specialty, and agreements by parol; and if an agreement be merely written, and no specialty, it is an agreement by parol, and a consideration must be proved.

4. Can a written contract be enlarged by parol ?

It cannot.—*Hamilton v. Wagoner*, 2 *Marsh. Rep.* 332.

5. Is a contract complete until the offer is accepted ?

It is not.—*McCulloch v. Eagle Ins. Co.*, 1 *Pick. Rep.* 281. *United States v. Goods per Susquehannah*, *Circuit Court, U. S. M. S. Rep. and Cox's U. S. Dig.* 192, § 51. *Summer et al. v. Williams*, 8 *Mass. Rep.* 198. *S. P. Eliason et al. v. Hanshaw*, 4 *Wheat. Rep.* 225.

6. May not a contract be made made by writing or words ?

It may, or by signs.—*Armstrong v. McGhee*, *Addis. Penn. Rep.* 261, *Per Cur.* A contract may be made by any signs which show an agreement of mind, though they be neither words nor writing, if there be understanding. It may be made between two men deaf and dumb.—*Smith v. Jones*.

7. If a contract be reduced to writing, is it complete until it is signed ?

It is not.—*Des Boulets v. Gravier*, 13 *Martin's Lou. Rep.* 420.

OF SALE.

1. What is a sale ?

A sale is a contract for the transfer of property from one person to another, for a valuable consideration, and three things are requisite to its validity, viz. the thing sold, which is the object of the contract, the price, and the consent of the contracting parties.—*Pothier, Traité du Contrat de Vente*, n. 3.

2. Must not the thing sold have an actual or potential existence ?

It must, and be capable of delivery, otherwise it is not strictly a contract of sale, but a special or executory agreement.—*Dig.* 18, 1, 8. *Pothier, Cont. de Vente*, n. 5, 6. *Plowd. Rep.* 13, a. *Grantham v. Hawley*, *Hob. Rep.* 132. *Harg. Co. Litt. lib. 1, n. 363*, *S. C. Robinson v. McDonald*, 6 *Maule & Selw.* 228. *Amer. C. L.* 504. A covenant to pay out of future profits is good.—*Chapham v. Moyle*, 1 *Lev. Rep.* 155. *Rondeau v. Wyatt*, 2 *H. Bl.* 63. *Mucklow v. Mangles*, 1 *Taunt. Rep.* 318. *Groves v. Buck*, 3 *Maule & Selw.* 178. See also 2 *Kent*, pp. 468—477, 3d edit.

3. Is inadequacy of price any ground for relief in equity against a bargain ?

None at all, unless it be so gross or excessive as to afford a necessary presumption of fraud, imposition, or undue influence.—*Osgood v. Franklin*, 2 *Johns. Ch. Rep.* 23, 24. The opinion of Sir Thomas Clarke, Lord Thurlow, Lord Ch. B. Eyre, Lord Eldon, and Sir Wm. Grant, were all referred to in the cases cited in support of that position. See also, to the same effect, *Copis v. Middleton*, 2 *Madd. Ch. Rep.* 410. One half the value might be set aside for inadequacy, and Lord Nottingham in *Nott v.*

Hill, 5 Ch. Cas. 120, observed that he wished it were so in England. See also, *Story's Commentaries on Equity Jurisprudence*, 248—254.

4. Does not, in every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* apply?

It does, and the party buys at his peril.—*Tanfield, Ch. Baron, Cro. Jac.* 197. *Holt, C. J., in Medina v. Stoughton*, 1 Salk. Rep. 210. If, however, the seller affirms the chattel not in his possession to be his, Mr. Justice Buller thinks he is bound to answer for the title, for the vendee had nothing else to rely upon, if the property was out of possession.—*Buller, J., in Paisley v. Freeman*, 3 Term Rep. 57, 58. There is good sense and equity in the observation. But if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title.—*Medina v. Stoughton*, 1 Ld. Raym. 523. 1 Salk. Rep. 210. *Adamson v. Jervis*, 12 B. Moore, 241. *Cross v. Gardner, Carth, Rep.* 90. A fair price implies a warranty of title, and the purchaser may have a satisfaction from the seller, if he sells the goods as his own, and the title proves deficient. This was also the rule of the civil law, in all cases, whether the title wholly or partially failed.—*Dig.* 21, 2, 1.

With regard to the quality or goodness of the article sold, the seller is not bound to answer, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he hath made a fraudulent representation, or used some fraudulent concealment concerning them, and which amounts to a warranty in law. The common law very reasonably requires the purchaser to attend when he makes his contract, to those qualities of the articles he buys, which are supposed to be within the reach of his observation and judgment, and which it is equally his interest and his duty to exert.—2 Kent, 478, 3d edit.

This distinction between the responsibility of the seller, as to the title, and as to the quality of the goods sold, is well established in the English and American law.—*Co. Lit.* 12. a. 2 Black. Com. 452. *Bacon's Abr. tit. Action on the Case, C. Comyn on Contracts*, 263. *Doug. Rep.* 20. *Parkinson v. Lee*, 2 East's Rep. 314. *Defreeze v. Trumpier*, 1 Johns. Rep. 274. *Johnson v. Cope*, 3 Harr. & Johns. 89. *Wilson v. Shackelford*, 4 Randolph's Rep. 5. *Dean v. Mason*, 4 Conn. Rep. 428. *Boyd v. Bobs*, 2 Dal. Rep. 91. *Emerson v. Brigham*, 10 Mass. Rep. 197. *Swett v. Colgate*, 20 Johns. Rep. 196. *Kimmel v. Litchly*, 3 Yates' Rep. 262. *Ritchie v. Summers*, *Ibid.* 534. *Willing v. Consequa*, 1 Peters' Rep. 317. 12 Serg. & Rawle, 181. *Tilghman, Ch. J. Chism v. Woods*, 1 Hard. Ken. Rep. 531. *Lanier v. Auld*, 1 Murphy Rep. 138. *Erwin v. Maxwell*, 2 ib. 345. *Westmorland v. Dixon*, 4 Haywood's Tenn. Rep. 227. *Barrett v. Hall*, 1 Aiken's Rep. 269. See also 2 Kent, 478—488.

OF THE PARTIES TO A CONTRACT.

1. Must not an agreement between parties be complete and concluded, to make a contract?

It must, and be binding upon each.—*Graham v. Call*, 5 *Munf. Rep.* 396. *Baker v. Glass*, 6 *Munf. Va. Rep.* 212. *Smallwood v. Mercer et al.* 1 *Wash. Rep.* 290. *Hudnut v. Bullock*, 3 *Marsh Ky. Rep.* 298.

2. Is not a *feme covert*, who trades as a *feme sole*, liable on her contracts?

If it is a contract relating to the business which she conducts, she is.—*Rhea et al. v. Renner*, 1 *Peters' U. S. Rep.* 105. *Gregory v. Paul*, 16 *Mass. Rep.* 31.

Can a *feme covert* bind herself, by an executory contract, to convey her own lands?

She cannot.—*Ex parte, Thomas*, 5 *Greenl. Me. Rep.* 50.

4. Is a husband bound by the contracts of his wife?

Not unless his assent may be fairly inferred.—*Webster v. McGinness*, 5 *Binn. Rep. Pen.* 236.

5. For what contracts only are infants liable?

For necessities only, and the value thereof.—*Rainwater v. Dunham*, 2 *Nott & M'Cord's S. Ca. Rep.* 524. *S. P. Ovis v. Kimball*, 3 *N. Hamp. Rep.* 314. *Wright v. Steele*, 2 *N. Hamp. Rep.* 51.

6. What if an infant pays money on a contract which he afterwards rescinds?

He cannot recover the money back again.—*M'Coy, v. Hoffman*, 8 *Cowen's N. Y. Rep.* 84.

7. Is a deed of bargain and sale by an infant void?

Not void, but voidable.—*Roberts v. Wiggin*, 1 *N. Hamp. Rep.* 73. *S. P. Jackson v. Carpenter*, 11 *Johns. N. Y. Rep.* 539.

It may, however, be avoided by an entry, or by a sound conveyance after he arrives at full age.—*Jackson v. Carpenter*, 11 *Johns. N. Y. Rep.* 539. *Oliver et al. v. Houselett*, 13 *Mass. Rep.* 239.

And to avoid or confirm a contract on the ground of infancy, the same evidence ought to be required as would be to make one.—*Rogers & Wife v. Hurd*, 4 *Day's Conn. Rep.* 62. *Ovis v. Kimball*, 3 *N. Hamp. Rep.* 314.

8. Are not all contracts made by infants against their interest void?

They are, and all contracts made by them with a semblance of advantage, are voidable.—*Action of ejectment for a lot of land.*

The plaintiff's wife had conveyed the land by deed to the defendant, when she was a *feme sole* and an infant.—*Mapes v. Wightman*, 4 Conn. Rep. 376, 379. *Wright v. Steele*, 2 N. Hamp. Rep. 55. *Warchester v. Eaton*, 13 Mass. Rep. 371. *Rogers & Wife v. Hurd*, 4 Day's Conn. Rep. 56. *Roberts v. Wiggins*, 1 N. Hamp. Rep. 73. *Jackson, ex Dem. Wallace v. Carpenter*, 11 Johns. N. Y. Rep. 539.

9. May not a corporation contract by an agent?

It can.—*Garvey v. Galcock, et al.*, 1 Nott & M'Cord's S. C. Rep. 231. *Bank of Columbia v. Patterson*, 7 Cranch Rep. 305.

10. Are not the master and owners both liable for the repairs of a vessel, made on a contract with the master?

They are, and a broker is agent for both parties.—*Mead et al. v. Buckener*, 2 Miller's Lou. Rep. 284. *Merrit v. Classon*, 12 Johns. N. Y. Rep. 102.

11. Are not the contracts of lunatics void?

Generally so, from the period at which the inquisition finds the lunacy to have commenced.—*Attorney General v. Parkhurst*, 1 Ch. Case, 112. *Yates v. Boen, Stra.* 1104.

12. Is the inquisition conclusive evidence of the fact?

It is not, but the party affected by the allegation of lunacy may gainsay it by proof; without first traversing the inquisition.—*Lugason v. Sealy*, 2 Atk. Rep. 412. *Faulder v. Silk*, 3 Campb. N. P. Rep. 126. *Baxter v. Earl of Portsmouth*, 5 Barnw. & Cress. 170 S. C. 7 Dow & Ryland, 614. 2 Carr & Payne, 178. *Denn v. Clarke*, 5 Halsted's Rep. 217.

13. Is it not a general rule that sanity is to be presumed, until the contrary be proved?

It is.—2 Kent, 451.

14. If a general mental derangement be once established or conceded, is not the presumption shifted to the other side?

It is, and sanity is then to be shown.—*Swimb. part 2, chap. 3, sec. 4*, 7. *Attorney General v. Panther*, 3 Bro. 441. *Lord Erskine in White v. Wilson*, 13 Vess. 88. *Jackson v. Sanderson*, 5 Johns. Rep. 144.

15. May not the party himself set up as a defence, and in avoidance of the contract, that he was *non compos mentis* when it was alleged to have been made?

He may.—2 Kent, 451.

The principle advanced by *Littleton & Coke*, that a man shall not be heard to stultify himself, has been properly exploded, as being manifestly absurd, and against natural justice.—*Littleton*, sec. 405. *Beverly's case*, 4 Co. 123. *Co. Litt.* 247. *Yates v. Bowen*, Str. Rep. 1104. *Lord Holt in Cole v. Robbins*, Buller's N. P. 172. *Webster v. Woodford*, 3 Day's Rep. 90. *Grant v. Thompson*, 4 Conn. Rep. 203. *Mitchell v. Kingman*, 3 Pick. Rep. 431. *Rice v. Peet*, 15 Johns. Rep. 503.

16. Was it not formerly the rule, that intoxication was no excuse, and created no privilege or plea in avoidance of a contract?

It was.—*Co. Litt.* 247.

But it is now settled, according to the dictates of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incapacity be produced by intoxication, is void.—*Lord Holt in Cole v. Robbins*, Buller's N. P. Rep. 175. *Lord Ellenborough in Pett v. Smith*, 3 Campb. R. 33. 1 *Starkie's N. P. Rep.* 126. *Sir W. Grant in Cooke v. Clayworth*, 18 Ves. 12. *Foot v. Tewksbury*, 2 Vermont Rep. 97. *Prentice v. Achorn*, 2 Paige's Rep. 30. *Burrowes v. Richman*, 1 Green's N. J. Rep. 233. *Aiken's Vermont Rep.* 167. Drunkenness rendered a contract void by the civil law.—*Pothier v. Traité des Oblig.*, 49 Heine Elem. Juris. Nat. 1, 14, sec. 329. *Bul. Ni. Pri.* 172, and *Pitt v. Smith*, Campb. Rep. 33. *Reynolds v. Walker*, 1 Wash. 164. *Wigglesworth v. Steers*, 1 Hen. & Mumf. 70.

If a person, for any considerable part of the time, be so intoxicated as to deprive him of his ordinary reasoning powers, it is *prima facie* evidence that he is incapable of managing his affairs.—*Per Walworth, Chancellor*, 1 Paige, 580.

17. Is imbecility of mind sufficient to set aside a contract?

It is not, when there is not any essential deprivation of the reasoning faculties, or an incapacity of understanding and acting in the ordinary affairs of life; this incapacity is now the test of that unsoundness of mind which will avoid a deed at law.—2 *Kent*, 452.

18. Can the law undertake to measure the validity of contracts, by the greater or less strength of the understanding?

It cannot, and if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him.—*Osmond v. Fitzroy*, 3 P. Wms. 129. *Lord Hardwicke in Bennet v. Vade*, 2 Atk. Rep. 324. *Ball v. Manning*, 1 Dow's N. S. Rep. 380.

Weakness of understanding may, however, be a material circumstance in establishing an inference of unfair practice or imposition; and it would naturally awaken the attention of a court of justice to every unfavorable appearance in the case.—2 *Kent*, 452.

19. Is a person born deaf and dumb to be deemed *non compos mentis*?

Not absolutely so, though by some of the ancient authorities he was

deemed incompetent to contract.—*Brower v. Fisher*, 4 *Johns. Ch. Rep.* 441. *Bracton de Exceptionibus*, lib. 5, ch. 20. *Fleta*, lib. 6, ch. 40. *Brit. tit. Escheat*, pl. 4. The civil law also held such afflicted persons to be fit subjects for a curator or guardian: *Inst.* 1, 23, 24. *Ibid.* 2, 13, 3. *Vinnes v. Ferrier*, h. t. *Mr. Justice Story*, in his very valuable *Commentaries on Equity Jurisprudence*, p. 227, 245, has fully discussed the question, and examined the authorities, both in the English and civil law, which bear on it, respecting the relief afforded in equity against contracts and other acts of persons wholly or partly *non compos mentis*.

20. Is the *bond* or other *specialty* of an idiot or lunatic binding upon him?

It appears not, at the present day.—*Yates v. Bowen*, *Str.* 1154 2 *Bla. C.* 291, 2. 1 *Fonbl. Tr. on Equity*, 5th ed. 48, n. *Per Bailey, J.*, *Bagster v. Earl of Portsmouth*, 5 *B. & C.* 170. *Faulder v. Silk*, 3 *Camp.* 126. As to a lunatic suffering a recovery, see *Egremont v. Vale*, 5 *M. & P.* 254. 5 *Bing.* 176, *S. C.* 236.

It would probably be advisable for the student who wishes further information on this subject, to see remarks of *Wilmot, J.*, in the case of *Evans v. Harrison*, *Wilmot's Notes*, 154, *et seq.* *Leach et al. v. Thompson*, *Show. P. C.* 150. 2 *Evans' Pothier*, 25, (*Philadel. ed.*, 1826.)

21. If an infant purchase necessities, and give a promissory note, signed by himself and a surety, and the surety afterwards pays the note, is he not entitled to recover the amount so paid, of the infant?

He is.—*Conn v. Coburn*, 7 *N. Hamp.* 368, and the cause of action arises when the surety pays the note.

21. If a husband, living in a state of separation from his wife, suffers his children to reside with the mother, is he not liable for necessities furnished them?

He is, and she is considered as his agent to contract for this purpose.—*Rumney v. Yoys*, 7 *N. Hamp.* 571. *Kembel v. Keys*, 10 *Wend.* 93.

23. Is a husband, who has turned away his wife for adultery, liable for her contracts?

Not for those made with persons having notice that he had discarded her.—*Hunter v. Boucher*, 3 *Pick.* 289. *M'Cutchen v. M'Gahey*, 11 *Johns.* 281. *M'Gahey v. Williams*, 12 *Johns.* 293.

24. Cannot a wife who is divorced *a mensâ et thoro*, maintain an action as *feme sole*, for injuries to her person or property?

She may, or upon contracts, express or implied, arising after the divorce.—*Dean v. Richmond*, 5 *Pick.* 461.

But a married woman has, in general, no power or capacity to contract, so as to sue or be sued, either with or without her husband, on her contract during coverture.—*Com. Dig., Baron & Feme, W. Pleader*, 2 *A.*

1. See the cases, 1 *Chitty's Pl.*, 5th ed. 32, 66, 232. *Cosio v. Bernales*, 1 R. & M. 102. And even in an action against both for a debt due from the wife before marriage, the declaration is bad if it state a promise by both after the marriage.—*Morris v. Norfolk*, 1 Taunt. 212. *Pittam v. Foster*, 1 B. & C. 248. 2 *Dowl. & R.* 363, S. C. She has, in legal contemplation, no separate existence, her husband and herself being in law but one person, and is unprovided with the means of satisfying her engagements, her husband being entitled to her rights and property. Her incapacity rests upon these principles, not upon the notion that she is under the control of her husband during the coverture, and cannot on that account assent.—*Chitty on Contracts*, 145. *Lit. sec.* 28.

25. If a wife improperly leave her husband *without his consent*, and continue absent from him, is he liable to a tradesman who, after an *express* warning to him to the contrary, supplies her with necessaries after her husband's refusal to receive her again, upon her offer to return?

He is not, although the wife were not furnished with the means of support by her husband; and although she had not committed adultery.—*Ibid.*, 144.

This was decided by eight judges against three, in the celebrated case of *Manby v. Scott*, 1 Sid. 109. *Bac. Abr.*, *Baron & Feme*, (St.) 1 Lev. 4, and 1 Mod. 123, S. C. *Hindley v. Marquis of Westmeath*, 6 B. & C. 200. 3 *M. & P.* 119, 123. 5 *Bing.* 550, S. C. *Chitty on Con.* 144. This rule seems to be materially relaxed in the modern cases.—*Bolton v. Prentice*, Str. 1214. 2 *Kent*, 148, where the true rule is clearly laid down.

26. Is it not now fully established, that a husband and wife cannot, by a deed securing a separate and sufficient maintenance to the wife, dissolve the relation of marriage, so as to enable the latter, even whilst living apart from her husband and enjoying such separate fund, to contract as a *feme sole*?

It is.—*Chitty on Contracts*, 145. *Marshall v. Rutton*, 8 J. B. 545.

The marriage and its legal consequences, as regards the wife, still exist, and consequently although the separation deed may be valid, and the husband is not liable for her debts, if the separate fund allotted to his wife be adequate to her support and be duly paid.—*Chitty on Contracts*, 145. *Marshall v. Rutton*, 8 J. B. 545.

The wife cannot contract, or sue or be sued at law, even for necessities; and he who trusts her, relies on her honor only.—*Chitty on Con.* 545. *Marshall v. Rutton*, 8 J. B. 545. Decided by the twelve judges, overruling *Corbitt v. Poelnitz*, 1 T. Rep. 5, and, *semble*, *Ringstead v. Lady Lanesborough*, 3 Doug. 197. See *Id.* 204, note, and other cases there cited. See argument, 1 *Powel on Contracts*, 80, &c. If a married woman under such circumstances hire furniture, the contract is *void*; so that the tradesman is not divested of his present property therein, and may maintain *trover* against a third person who takes it.—*Smith v. Plomer*, 15 East, 607. As to arresting her or taking her in execution, *Tidd*, 9th ed. 194, 1026. Since this doctrine has been established, it must also be considered

that a married woman is not liable on her contracts, although she live apart from her husband in a state of adultery, and there exists a valid *divorce a mensâ et thoro*, and she contracts during the separation in the assumed character of a single woman.—*Chitty on Contracts*, 146. *Lewis v. Lee*, 3 B. & C. 291. 5 D. & R., 98, S. C. *Faithorne v. Blaquire*, 6 M. & Selw. 73. *Tuttle v. Morseley*, 3 Doug. 290. *Sed Vide*, *Cox v. Kitchen*, 1 B. & P. 338.

Nor is her personal representative liable under such circumstances at least at law, although he have abundant assets.—*Chitty on Contracts*, 146, *Ib.* *Clayton v. Adams*, 6 T. R. 604.

Where a citizen of another state compelled his wife by cruel treatment to leave his house, without making any provision for her support, and married another woman, and the wife after her expulsion came to Massachusetts, where she maintained herself for twenty years, by her own industry, it was held that she was competent to sue as a *feme sole*.—*Chitty on Contracts*, 145. *Abbott v. Bailey*, 6 Pick. 89. The foregoing case (*Abbott v. Bailey*, 6 Pick. 89,) may be found in a note, p. 145. *Chitty on Contracts*, 4th American edition, from the 2d London edit., published by G. & C. Merrian, Springfield, 1839. J. C. Perkins, Esq., is the editor of this American edition, and has with much care, fidelity and accuracy, collected a large number of the American cases, which are added in notes to the work. Every American student should avail himself of the advantages of a perusal of this work. In regard, however, to those several cases mentioned previous to the one above, there are, as to all other general rules, some few exceptions, introduced, as well for the benefit of the wife, to save her from starvation, as in justice towards her creditors, who, under the peculiar circumstances which give rise to these modifications of the general principle, have not other remedy; for further information of which, see *Chitty on Contracts*, p. 146.

27. If an alien husband have never been in the country where his wife resides, and she contracts debts in the place of her residence, will she not be responsible for the same?

It seems she will.—*Chitty on Contracts*, 148. *Duchess of Mazarine's Case*, 1 Ld. Raym. 147. *Key v. De Pienne*, 3 Camp. 124. *Per Lord Ellenborough*. *Williamson v. Dawes*, 9 Bing. 295, 296. 3 M. & Scott, 352, S. C., *per Bosanquet, J.* *De Gallion v. L'Aigle*, 1 B. & P. 357, would seem to be sustainable, on the ground that defendant's husband was probably a *foreigner*, but that fact does not appear upon the pleadings, and the question came before the court on a demurrer. But in the case of an alien who has once *resided* in the country, the *animus revertendi* is, it seems, to be *presumed*, unless the contrary appear, and therefore *Lord Ellenborough* adjudged, at *Nisi Prius*, that a woman by birth an alien and the wife of an alien, cannot be sued as a *feme sole* if her husband has lived in this country, although he has left her here and entered into the service of a foreign state.—*Chitty on Contracts*, 148. And the court of King's Bench confirmed this decision.—*Kay v. De Pienne*, 3 Camp. 123. *Sed Vide*, *Walford v. De Pienne*, and *Franks v. De Pienne*, 2 Esp., 554, 587. *Burfield v. De Pienne*, 2 New R. 380. Clearly in the case of an Englishman who may at any time be recalled by the king.—*Chitty, Jun. on Prerog.*

24, 5, and whose return is to be presumed, his mere residence abroad is not tantamount to a civil death; and the wife who contracts in this country is not liable to be sued, and cannot sue as a *feme sole*.—*Chitty on Contracts*, 148. *Marsh v. Hutchinson*, 2 B. & P. 226. *Farrar v. Grannard*, 1 New R. 80. *Bogget v. Frier*, 11 East, 301. *The case of Ringstead v. Lady Lanesborough*, 3 Doug. 197, cannot now be considered law, although she assumed that character.—*M'Namara & Wife v. Fisher*, 3 Esp. Rep. 18. And in a late case, it was decided that a married woman cannot be sued upon her contract, although before it was made her husband became bankrupt, and absconded without appearing to his commission and continues to reside abroad.—*Chitty on Contracts*, 148. *Williamson v. Dawes*, 3 M. & Scott, 351. 9 Bing. 292, S. C.

28. How many years does the law require the husband to be absent before it is presumed that he is dead?

Seven years, and at the end of that time the wife is liable as a *feme sole*.—*So says the law of England*. *Hopewell v. De Pienne*, 2 Camp. 113, 273. 1 Jac. 1, c. 11, s. 2. *Rowe v. Hasland*, 1 Bla. R. 404. *Doe v. Jesson*, 6 East, 80. I am indebted to Mr. Perkins, the learned American editor, *Chitty on Contracts*, p. 1481, for the two following notes:

1. The law seems to be settled, that when the wife is left by the husband; has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same whether the husband is banished for his crimes, or has voluntarily abandoned the wife.—*Rhea et al. v. Rhenner*, 1 Pet. S. C. U. S. Rep. 105.

2. A *feme covert*, whose husband deserted her in a foreign country, and who there afterwards maintained herself as a single woman, and for five years had lived in Massachusetts, the husband being a foreigner and having never been within the United States, was held competent to sue and be sued, as a *feme sole*, and her release would be a valid discharge for any judgment she might recover.—*Gregory v. Paul*, 15 Mass. 31. *Edwards v. Davies*, 16 Johns. 286. *Troughton v. Hill*, 2 Haywood, 406. *Wright v. Wright*, 2 Des. 243. *Abbott v. Bailey*, 6 Pick. 89. *Beam v. Morgan*, 1 Hill, S. C. 4 M'Cord, 148.

By the custom of London, a *feme covert* being a sole trader in the city independently of her husband, may sue and be sued in the city courts with reference to her dealings as such trader in London.—*Chitty on Contracts*, p. 148. *Bac. Abr. Baron & Feme*, (m.)

But even there it seems, as well as in the courts of Westminster, the husband must be made a party to the suit for conformity.—*Candell v. Shaw*, 4 T. R. 361. *Beard v. Webb*, 2 B. & P. 93. 4 M'Cord, 413.

But the wife shall be considered to be the real and substantial party to the suit.—*Laughan v. Bewell*, Cro. Car. 67. 10 Mod. C. *Beard v. Webb*, 2 B. & P. 93, 101. See 3 Chit. Com. L. 37.

29. Will any temporary absence of a husband or a separate maintenance, or living apart from the wife, enable the latter to sue or subject her to be sued alone?

It will not.—*Robinson v. Reynolds & Wife*, 1 Aik. 74.

30. May not a wife become a *feme sole* trader by the privity and acquiescence of her husband?

She may, although there be no deed from him.—*M'Grath v. Robertson*, 1 Des. 445. In Pennsylvania and South Carolina (and perhaps in some other states), a wife may act as a *feme sole* trader, and become liable as such, in imitation of the custom of London.—*Burke v. Winkle*, 2 S. & Rawle, 189. *Newbiggan v. Pillans*, 2 Bay, 162.

31. Does not the sentence of a court of competent jurisdiction, annulling the marriage *ab initio*, entirely remove the incapacity of the *feme*?

It does, and renders her responsible as if the ceremony of marriage (it being void) had never taken place.—*Chitty on Contracts*, 148. *Anstey v. Manners*, 1 Gow. R. 10. There are cases, in which, as an exception to the general rule, *Chitty on Contracts*, 148, 1 *Chitty's Pl. 5th edit.* 33, *Cosio v. De Bernales*, 1 R. & M. 102, married women have been allowed to join with their husbands, in actions upon certain contracts or instruments entered into even during the coverture, and with regard to which the wife is, as it is termed, the *meritorious cause of action*.—*Chitty on Contracts*, 148.

Thus, in the instances, on an *express* promise to the wife, in consideration of her *personal labor and skill*, as that she would cure a wound, and of a bond, or promissory note, payable on the face thereof, respectively to her, or, as it seems, to her husband and *herself*, she may be joined with him in the action, or he may sue alone.—*Brashford v. Buckingham*, Cro. Jac. 77, 205. *Fountain v. Smith*, 2 Sid. 128. *Weller v. Baker*, 2 Wills. 424. *Day v. Pargraue*, 2 M. & Selw. 396, note (b.) *Phillis-kirk v. Pluckwell*, 2 M. & Selw. 303.

The declaration should expressly show in what respect the wife has a prominent and particular interest, enabling her to join, *Bigwood v. Way*, 2 Bla. R. 1836. *Phillis-kirk v. Pluckwell*, 2 M. & Selw. 396. In the case of a bond or note expressly payable to her, or to both, it would sufficiently appear, from the instrument itself, if set out truly in the declaration, without further averment, that she had a particular interest. Where husband and wife declared for a debt due for a cure effected by the wife during coverture, and the declaration also contained a charge for *medicine supplied*, upon general demurrer, it was held, that the wife was improperly joined, as she was not the sole cause of action; the medicines being the property of the husband only.—*Holmes & Wife v. Wood*, cited in 2 Wills. 424, noticed by Lord Ellenborough, in 3 M. & Selw. 396. The husband may declare alone, on a note made to his wife, during coverture, alleging it was payable to him.—*Arnould v. Revoult*, 4 Moore, 71, 72. *Nuns v. Wills*, 4 B. & Ald. 739.

And it seems, in these cases, that the wife is entitled by survivorship, to the money due upon the judgment recovered by both.—1 *Chit. Pl. 5th edit.* 36. *Co. Litt.* 351. a. n. (1.) *Bidgood v. Way*, 2 Bla. R. 1839. And it seems she takes by survivorship, money due on a decree in chancery, in a suit by both.—*Adams v. Lavender*, M'Clel. & Y. 41.

See also a case determined in the United States, mentioned by that

industrious author, Mr. Perkins, in *Chitty on Contracts*, p. 149. The *State Use of Rogers v. Krebs et al.* 6 Har. & J. 37, here follows another by the same author, where money was lent by a wife to her husband, who signed an agreement to repay it to her, the parties being at the time residents of Louisiana, the law of which country recognized such contracts as valid, it was held that the wife might maintain an action in Pennsylvania, against the executors of her husband, to recover the amount, although she could not have sued him in his lifetime.—*Dougherty v. Snyder*, 15 Serg. & Rawle. 84.

32. May not a married woman be an executrix or administratrix ?

She may, and where a married woman, being executrix, took a note from her husband, and A B, during coverture, for money lent by her, in her representative character, to her husband, it was held that she might, after her husband's death, sue A B upon the note.—*Richards v. Richards*, 2 B. & Ald. 447.

33. May not a married woman, acting as *feme sole* trader, enter into a bond ?

She may, provided it be such as relates to, or is in some manner connected with her business as a trader.—*M'Dowal v. Wood*, 2 N. & M'Cord, 242.

34. Is not the husband answerable for the wife's debts before coverture ?

He is ; but if they are not recovered during the coverture, he is discharged.—2 *Kent's Commentaries on American Law*, 142.

35. In virtue of what, only, is he answerable for her debts ?

Only in virtue of the duty imposed on him to discharge all the obligations of the wife ; and that his responsibility should cease after coverture ceases, is, in some cases, rather against conscience ; but then, as a compensation for the rule, it is to be considered that the charging the husband, in all cases, with the debt, would be against conscience also.—2 *Kent*, 144.

36. Is it not a strict rule of law, which throws upon the husband, during coverture, all the obligations of the wife ?

It is ; and by the same rule of law, he is discharged after coverture ceases by the death of the wife. Courts of equity have held, that they could not vary the rule of law, according to the fact, whether the husband had, or had not, received a portion with his wife, or charge his conscience more in one case than in the other.—2 *Kent*, 144. This is the meaning of the case of *Hurd v. Stanford*, according to Lord Redesdale's explanation of the rule on this point.—3 *P. Wms.* 409. *Cases temp. Tabl.* 173. 1 *Sch. & Lef.* 263. *Witherspoon v. Dubose*, in court of appeals in *S. C. Law Journal* No. 3, p. 336.

37. Suppose a man marries a woman who is largely indebted at the time of their marriage, but has ample means of personal property of her own (say cash if you please), to pay all her debts, and her husband takes the money or appropriates all her personal property, or both to himself, and the wife dies before the creditors have collected their debts; how would the case stand if the husband refuse to pay her debts, could he do so and be sustained by the law and allow her debts to remain unpaid?

If, Mr. Student, you perfectly understand the answer in reply to this question, it could be of no service to you for me to write it here; but on the other hand, if a shade of doubt exist in your mind in regard to the answer, that doubt may be easily removed, if you will consult *p. 144, 145, 146, 2 vol., 3d edit. of the Commentaries on American Law by Mr. Chancellor Kent.*

38. Can any contracts be made between husband and wife?

Not without the intervention of trustees, for she is considered as being *sub potestate viri*, and incapable of contracting with him; and except in special cases within the cognizance of equity, the contracts which subsisted between them prior to the marriage are dissolved. The wife cannot convey lands to her husband, though she may release her dower to his grantee; nor can the husband convey lands by deed directly to the wife.—*Martin v. Martin*, 1 *Greenleaf's Rep.* 394. *Howe v. Hamilton*, 3 *Greenleaf's Rep.* 63. The husband may devise lands to his wife, for the instrument is to take effect after his death; and by a conveyance to uses, he may create a trust in favor of his wife.—*Co. Litt.* 112. *a.* and equity will decree performance of a contract by the husband with his wife, for her benefit.—2 *Kent*, 129. *Moore v. Ellis*, *Bunb. Rep.* 205. *Livingston v. Livingston*, 2 *Johns. Ch. Rep.* 537. *Shepard v. Shepard*, 7 *Johns. Ch. Rep.* 57. The general rule is: that the husband becomes entitled on the marriage, to all the goods and chattels of the wife, and to the rents and profits of her lands, and he becomes liable to pay her debts, and to perform her contracts.—2 *Kent*, 130.

39. Is not parol evidence admissible to explain and qualify the warranty contained in the bill of parcels?

It is.—*Wallace v. Rogers*, 2 *N. Hamp.* 506. *Harquies v. Plymton*, 11 *Pick.* 97. *Bradford v. Manley*, 13 *Mass.* 139.

So parol evidence of an agreement to indemnify and save harmless a purchaser of personal property, is admissible, although the agreement as to the sale is in writing, and contains no such stipulations, provided the parol agreement be made subsequent to the execution of the written agreement.—*Brewster v. Countryman*, 12 *Wend.* 446.

40. Is a subsequent parol agreement to postpone the time of delivery of articles under an agreement without seal, a waiver of the agreement?

It is not, but only an enlargement of the time for its performance.—*Yonqua v. Nixon*, 1 *Pet. U. S.* 221. *Bank v. Woodward*, 5 *N. Hamp.*

99. *Baily v. Johnson*, 9 Cowen 115. *Frost v. Everett*, 5 Cowen, 497. *Keating v. Price*, 1 Johns. Cas. 22. *Watkins v. Hodges*, 6 Harr. & Johns. 28.

41. May not the time of performing the condition of a bond be enlarged?

It may, or the farther performance waived by parol.—*Fleming v. Gilbert*, 3 Johns. 528.

42. May not a right of action be waived after breach of a sealed contract, or released by a new parol contract relative to same subject matter?

It may, or by any valid parol executed contract.—*Delacroix v. Bulkley*, 13 Wend. 71.

OF THE REQUISITE CONSIDERATION.

1. Is it not essential to the validity of a contract, that it is founded on a sufficient consideration?

It is.—2 *Kent*, 463. And a contract without consideration is a *nudum pactum*, and not binding in law, though it may be in point of conscience; and this maxim of the common law was taken from the civil law, in which the doctrine of consideration is treated with an air of scholastic subtlety.—*Dig. lib. 2 tit. 14, ch. 7, sec. 4, a. 1.* 19. 55.

2. Is not the agreement, whether verbal or in writing, without a consideration, *nude pact*?

It is, and will not support an action, 2 *Kent*, 463. This was finally settled in England, in the House of Lords, in *Ram v. Hughes*, and the rule has been adopted and probably prevails extensively in this country.—7 *Term Rep.* 350, note 7 *Bro. P. P.* 550. *S. C.* *Burnett v. Biscoe*, 4 *Johns. Rep.* 235. *Thacker v. Dinsmore*, 5 *Mass. Rep.* 301, 302. *Homer v. Hollenbeck*, 2 *Day's Rep.* 22. *Cooke v. Bradley*, 7 *Conn. Rep.* 57. *Brown v. Adams*, 1 *Stewart's Ala. Rep.* 51. *Beverly v. Holmes*, 1 *Munf. Rep.* 95. *Parker v. Carter*, *Ibid.*, 273.

3. To what does the rule that the consideration is necessary to the validity of a contract apply?

It applies to all contracts and agreements not under seal, with the exception of Bills of Exchange and negotiable notes, after they have been negotiated and passed into the hands of an innocent endorsee.—2 *Kent*, 463.

4. Is not suffering a person to do a beneficial act a consideration?

It is.—*Taylor v. Jones*, 1 *Ld. Raym.* 312.

5. Is natural affection a sufficient consideration to ground an action upon?

It is not.—*Beet v. J. S. and Wife, Crok. Eliz.* 756.

6. Is not a notice of an assignment of a chose in action, and a promise to pay the assignee, a sufficient obligation?

It is.—*Crocker v. Whitney, 10 Mass.* 316.

7. Is not a contract for the use and occupation of apartments for the purpose of prostitution void?

It is.—1 *Esp. Rep.* 13.

8. Is not a contract which binds a party to a total restraint of trade, a void contract?

It is.—*Mitchell v. Reynolds, 1 P. Wms.* 181. But a man may contract and restrain himself from exercising it in any particular place, for it is said public policy is not concerned where a man carries on his business, and there may happen instances where such a contract may be useful and even beneficial, as to prevent a town from being overstocked with any particular trade.—*Mitchell v. Reynolds, 1 P. Wms.* 181.

9. Is not an agreement by the payee of a promissory note, to forbear to sue the maker for one year, a sufficient consideration of a guarantee by a third person of the payment of a note?

It is.—*Sago v. Wilcox, 6 Conn. Rep.* 81.

10. Is not a promise by a father to his son, in writing, to provide for him on his marriage, by the gift of certain negro slaves, and one half of his stock, binding?

It is, and although the father did not perform his promise in his lifetime, and made other dispositions for him in his will, it was held that the son was entitled to recover from his father's executors.—*Caborne v. Godfrey, 3 Des.* 514.

11. Is not a promise to give the plaintiff a certain quantity of land, and certain articles of personal property in consideration of his marrying the defendant's niece, valid?

It is.—*Barr v. Hill, Addis,* 276.

12. Do labor and services gratuitously performed by the plaintiff for the defendant, afford any cause of action?

They do not, however meritorious or beneficial they may be; as to the removal of his property to save it from destruction by fire.—*Bartholomew v. Jackson, 20 J. R.* 28.

13. Will a past and executed consideration support a promise?

It will not.—*Mills v. Wyman*, 3 *Pick. Mass. Rep.* 207, 212. *Cook v. Bradley*, 7 *Conn. Rep.* 57. *Bulkley v. Landon*, 2 *Conn. Rep.* 404, 416. *Wethersfield v. Montague*, 3 *Conn. Rep.* 507.

14. Is a mere inadequacy of consideration sufficient to invalidate a contract?

It is not.—*Howard v. Rogers, Har. & Johns. Md. Rep.* 278. *Hurn v. Soper*, 6 *Har. & Johns. Rep.* 276, 282. *Stewart v. the State*, 2 *Har. & Gill. Md. Rep.* 114. *Whitfield v. McLeon*, 2 *Bay's S. Ca. Rep.* 380.

And a promise cannot be avoided, as being without consideration, being made without any moral obligation.—*Boutell v. Cowden*, 9 *Mass. Rep.* 254. *Bowers v. Hurd*, 10 *Mass. Rep.* 427.

15. Is the contract to purchase a number of lots dissolved by the failure of title to a part of them?

In reply to this question, the answer in general would probably and very properly be, that the contract would not be dissolved. Much, however, depends upon the circumstances of the case; for instance, a contract to purchase a number of lots, is not dissolved by the failure of title to a part of them; the vendee will be entitled to a reduction of price only.

On the other hand, where the loss is so excessive as to render the residue of little value, here reason, justice, equity, and law, unite to dissolve the contract.—*Stoddard v. Smith*, 5 *Binney's Penn. Rep.* 355.

There is a case reported in the *S. Ca. Rep.* If I mistake not, the case is *Caldwell v. Kain*, 2 *Nott & M'Cord's*. It matters but little whether I am right or wrong in the name of the case, the facts appear to be as follows: The plaintiff held a note against one Miller, and the defendant gave him his note, on condition that the plaintiff would give him Miller's note, which was not done. In this case the court, *Johnston, J.* was of opinion that the plaintiff could not recover.—*Vide Aiken v. Duren*, 2 *Nott & M'Cord's*, 370. The consideration had failed by the non-delivery of Miller's note.

I think the case of *Byrd v. Craig*, is another somewhat similar to the last.—15 *Martin's Lou. Rep.* 625.

16. Is it necessary to state the consideration in the declaration?

It is absolutely so. A consideration is as necessary to an agreement reduced to writing, as if it remained in parol.—*Burnett v. Biscoe*, 4 *Johns. N. Y. Rep.* 234. *Sears v. Brink*, 3 *Johns. Rep.* 214. *Pearson v. Pearson*, 7 *Johns. Rep.* 26.

17. Is it not a rule of law that a verbal agreement, though reduced into writing, is not valid without a good consideration?

Such is the rule of law, and on this point the law is now well settled.—*Chandler's Executors v. Hill*, 2 *Hen. & Munf.* 124, 130. *Union Turn-*

pike Company v. Jenkins, 1 *Caine*, 387. *Per Lewis, Ch. J., Beverleys v. Holmes*, 4 *Munf.* 95. *Parker v. Carter*, 4 *Munf.* 273. *Moseley v. Jones*, 5 *Munf.* 23. See also *Slade v. Halstead*, 7 *Cowen*, 322. 1 *Bac. Abr.* (*Wilson's edit.*) 112. *Hart's Exrs. v. Coram*, 3 *Bibb*, 26. *Prior v. Lindsay*, 3 *Bibb*, 76. *Cook v. Bradley*, 7 *Conn. Rep.* 57. *Winthrop et al. v. Lane et al.*, 3 *Dessau*, 310, 341. *Hosmer v. Hollenbeck*, 2 *Day*, 22.

18. Is not forbearance to sue, a sufficient consideration for a promise to pay the debt of another?

Generally so; particularly if there be a forbearance for a long time.—*Elting v. Vanderlyn*, 4 *J. R.* 237. *Leamaster v. Burckhart*, 2 *Bibb*, 25, 30.

19. Is not an agreement by a surety to forbear his suit against his principal *when his cause of action should arise*, a good consideration for a promise of indemnity?

It is; although at the time of the agreement he had no cause of action against the principal.—*Hamaker v. Eberly*, 2 *Binn.* 506.

20. Is not an agreement to release the residue of a judgment, on receiving a note of a third person in satisfaction of a part of it, a valid contract?

It is, and will be enforced. The subject matter in this case was as follows: Gould recovered a judgment against Colburn, and took out execution; plaintiff and defendant agreed that Gould would receive the promissory note of a third person, for a stipulated sum, agreed upon by the parties, and plaintiff would release the residue of the judgment.

The note was procured, and accepted by Gould, who endorsed the amount on the execution, but afterwards levied the balance. *Per Cur., Bell, J.* To the validity of such a contract, there can be no objection, and the law will not suffer the creditor to violate the contract with impunity.—*Colburn v. Gould*, 1 *New Hamp. Rep.* 279.

And several other cases confirm the opinion of the court as correct in this.—*Steinman et al. v. Maguns*, 11 *East*, 370. *Jackson v. Duchase*, 3 *Term Rep.* 552. *Cockshot v. Bennett*, 2 *Term Rep.* 764. *Jackson v. Lomas*, 4 *Term Rep.* 168. *Smith v. Bromley*, *Doug.* 671.

21. Is a promise to pay, if a party would swear to the truth of his demand, a good consideration?

If he makes the affidavit accordingly, the promise is valid, and it is a good consideration, and the defendant cannot prove that the plaintiff was mistaken or had sworn falsely.—*Broons v. Ball*, 18 *Johns. N. Y. Rep.* 337.

22. Is not a written contract by an executor to pay a debt of the testator barred by the statute of limitations, without consideration?

It is, a *nudum pactum* is all that can be made of it.—*Harrison v. Field's Exrs.*, 2 *Wash. U. S. Rep.* 136. *Taliaferro v. Robb*, 2 *Call*,

258. *Schoonmaker v. Roose*, 17 *Johns. N. Y. Rep.* 301. *Ten Eyck v. Vanderpool*, 8 *Johns. Rep.* 93.

23. Are not the words "value received," in a written contract, evidence of a good consideration?

They are.—*Lapham v. Barrett*, 1 *Vt. Rep.* 247. *S. P. Jerome v. Whitney*, 7 *Johns. New-York Rep.* 321. *Jackson v. Alexander*, 3 *Johns. Rep.* 584.

24. Will a past consideration support a promise?

It will not, unless alleged to have been at the request of the person charged.—*Comstock v. Smith*, 7 *Johns. Rep.* 87. *Doty v. Wilson*, 13 *Johns. Rep.* 378. *Greeves v. McAllister*, 2 *Binney's Penn. Rep.* 591. *Massay v. Crane*, 1 *McCord's S. Caro. Rep.* 489.

25. Where a man is under moral obligation, which no court of law or equity can enforce, and *promises*, does not the honesty and rectitude of the thing make it a valid consideration?

It does. As if a bankrupt in affluent circumstances after his certificate, promises to pay the whole of his debts.—*Couper*, 544, *Doug.* 101, *note*. Or if a man promises to pay a just debt, the recovery of which is barred by the statute of limitations, it will bind him to his promise.—1 *Ld. Raymond*, 389. So also if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, his promise will be obligatory upon him.—*Stra.* 690. 1 *Term Rep.* 648.

Lord Mansfield very justly remarks (*Couper*, 290), that in these and many other instances, though the promise gives a compulsory remedy where was none before either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration.

There is probably no principle in law more firmly established than that such *promises* are binding in law; the authorities on this subject are extremely numerous, but almost all, or in fact the principal source of litigation in these cases, appears to have arisen upon the question what is, and what is not sufficient evidence to revive the original cause of actions.

Many cases have arisen under this head, a reference to a few is here given.—*Thompson v. Peter*, 12 *Wheat.* 565. *Bell v. Morrison*, 1 *Peters*, 351, 362. *Bell v. Rowland*, *Hardin*, 301. *Baxter v. Penniman*, 8 *Mass. Rep.* 133. *Fisk v. Needham*, 11 *Mass. Rep.* 452. *Guier v. Pierce*, 2 *Brown*, 35. *Miles v. Modee*, 3 *Serg. & R.*, 211. *Smith v. Freel*, *Addis*, 291. *Browne v. Campbell*, 1 *Serg. & Rawle*, 176. *Jones v. Moore*, 5 *Binn.* 573. *Beal v. Edmondson*, 3 *Call*, 446. *Marshall v. Daliber*, 5 *Conn. Rep.* 480. *Betts v. Fuller*, 1 *McCord*, 541. *King v. Riddle*, 7 *Cranch*, 168. *Clemenston v. Williams*, 8 *Cranch*, 72. *Kane v. Bloodgood*, 7 *Johns. Ch. Rep.* 90. *Robins v. Otis*, 1 *Pick.* 368. *Welzell v. Bussard*, 11 *Wheaton*, 309.

26. Is not a promise by A to B that B might pass and repass over the land of A, only a gratuitous license?

It is, and is revocable at pleasure; and if A afterwards fence and shut up the land, so that B cannot pass or repass, no action will lie.—*Dexter v. Hazen*, 10 J. R. 246.

27. If a workman be employed to do a particular job, and he chooses to perform some additional work, without consulting his employer, can he recover for such additional work?

He cannot.—*Hart v. Norton*, 1 McCord, 22. See further in *Phettyplace v. Steere*, 2 J. R. 442.

28. Is not a promise to pay, founded on a past consideration, valid?

It seems to be a well settled rule that it is, if the past services are alleged to have been done on request, and if not so alleged, a request may be presumed from the beneficial nature of the consideration and the circumstances of the case.—*Hicks v. Buchans*, 10 J. R. 243. See also *James v. Bixby*, 11 Mass. Rep. 37. Per *Parker, J.*, *Livingston v. Rogers*, 1 Caines, 548. Per *Kent, J.*, 1 *Swift's Dig.* 203.

29. Is there any distinction as to the consideration whether the contract be by parol or by writing?

There is not.—*Cook v. Bradley*, 7 Conn. Rep. 57. *Winthrop et al. v. Lane*, 3 Des. Rep. 310, 341. *Hosmer v. Hollenbeck*, 2 Day's Rep. 22. *Chandler's Ex'rs v. Hill*, 2 Hen. & Munf. Rep. 124, 130. *The People v. Howel*, 4 Johns. Rep. 296. *Union Turnpike Comp. v. Jenkins*, 1 Caines' Rep. 387. *Beverleys v. Holmes*, 4 Munf. Rep. 273. *Moseley v. Jones*, 5 Munf. 23. *Slade v. Halstead*, 7 Cow. Rep. 332. *Harts' Ex'rs v. Coram*, 3 Bibb. Rep. 26. *Prior v. Lindsley*, 3 Bibb. Rep. 76. *Burnett v. Biscoe*, 4 Johns. N. Y. Rep. 234. *Pearson v. Pearson*, 7 Johns. Rep. 214.

30. May the consideration of a contract be inquired into?

It may, even between parties to a deed.—*Moseley v. Jones*, 5 Munf. 23. *Hosmer v. Hollenbeck*, 2 Day's Rep. 22. *Whitbeck v. Whitbeck*, 9 Cowen's Rep. 266. *Shepard v. Little*, 14 Johns. Rep. 210. *Bower v. Bell*, 20 Johns. Rep. 338.

31. If the promise to pay a debt barred by the statute, be conditional, will the remedy be revived unless the condition be performed?

It will not, or a readiness to perform be shown.—*Scouton v. Eislord*, 7 J. R. 36. *Kingston v. Wharton*, 2 Serg. & Rawle, 208. *Bush v. Barnard*, 8 J. R. 318, 2d edit. *Read v. Wilkinson*, M. S. Rep., Whart. Dig., 425. S. C. 2 Brownl. App. 16.

As to the sufficiency of a moral obligation, accompanied by a subsequent express promise to sustain *assumpsit*, see *Steward v. Eden*, 2 Caines, 150. *Doty v. Wilson*, 14 J. R. 378. Per *Parson, Ch. J.*, *Salem v. Andover*, 3 Mass. Rep. 436, 438, by the whole court. *Davenport v. Mason*, 15 Mass. Rep. 94. Per *Wild, J.*, 1 *Swift's Dig.* 204, 205. *Andover &*

Medford Turnpike Corporation v. Gould, 6 *Mass. Rep.* 40, 43. *Crocker v. Whitney*, 10 *Mass. Rep.* 316. *Mowry v. Todd*, 12 *Mass. Rep.* 281. It might not be amiss here to remark, that the broad foundation upon which these authorities rest, has, by some recent decisions, been very much narrowed. See cases, *Cook v. Bradley*, 7 *Conn. Rep.* 57. *Mills v. Wyman*, 3 *Pick.* 207. *Smith v. Ware*, 13 *A. R.* 257.

32. If A sign a writing that he will sell B a house on certain terms, is it not a mere proposition ?

It is, and not an agreement, unless B assents to it.—*Brace v. Pearson*, 3 *Johns.* 534. *Tucker v. Wood*, 12 *Johns. Rep.* 190. *Tuttle v. Love*, 7 *Johns.* 470.

33. Does the want of a counterpart to a written agreement render it invalid ?

It does not.—*Phelps v. Townsend*, 8 *Pick.* 392.

34. Must not mutual promises to be binding be concurrent and obligatory upon both parties at the same time ?

They must.—*Keep v. Goodrich*, 12 *Johns. Rep.* 397. *Livingston v. Rogers*, 1 *Caines' Rep.* 583. *Tucker v. Wood*, 12 *Johns. Rep.* 190.

35. What is a valuable consideration ?

It is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.—*Jones v. Ashburnham*, 4 *East's Rep.* 455. *Lent v. Padelford*, 10 *Mass. Rep.* 236. And any damage or suspension, or forbearance of a right, will be sufficient to sustain a promise.—*Seaman v. Seaman*, 12 *Wendell's Rep.* 381.

36. Does not a mutual promise amount to a sufficient consideration ?

It does, provided the mutual promises be concurrent in point of time, and in that case, the one promise is a good consideration for the other.—2 *Kent* 464. But if two concurrent acts are stipulated, as delivery by the one party and payment by the other, no action can be maintained by either, without showing a performance, or what is equivalent to a performance, of his part of the agreement ; if the consideration be wholly past and executed before the promise is made, it is not sufficient, unless the consideration arose at the instance or request of the party promising, and that request must have been expressly made or be necessarily implied from the moral obligation under which the party was placed : and the consideration must have been beneficial to the one party or onerous to the other.—*Jenkins v. Tucker*, 1 *H. Black. Rep.* 90. *Livingston v. Rogers*, 1 *Caines' Rep.* 584. *Comstock v. Smith*, 7 *Johns. Rep.* 87. *Hicks v. Burhans*, 10 *Johns. Rep.* 343. *Wing v. Mill*, 1 *Barnw. & Ald.* 104.

37. Is not a subsisting legal obligation to do a thing, a sufficient consideration for a promise to do it ?

It is ; but it is a disputed and unsettled point, whether a moral obligation be of itself a sufficient consideration for a promise, except in those cases in which a prior legal obligation had once existed.—*Edwards v. Davis*, 16 *Johns. R.* 281. *Mills v. Wyman*, 3 *Pick. Rep.* 207. *Cook v. Bradley*, 7 *Conn. Rep.* 57. The question how far a mere moral obligation was sufficient to raise and support an *assumpsit* is learnedly and clearly stated and discussed in the note to 3 *Boss. & Pull.* 249, and the note to 16 *Johns. Rep.* 283 : and the conclusion to which the learned editors arrived, seems to have been adopted in the cases referred to, and yet in one of the cases (*Lee v. Muggeridge*, 5 *Taunt. Rep.* 36,) *Gibbs, J.*, observed, that it could not now be disputed, that whenever there is a moral obligation to pay a debt or perform a duty, a promise to pay that debt or perform that duty would be supported by the previous moral obligation. The same doctrine is laid down by *Bailies, J.*, in *Barlow v. Smith*, 4 *Vermont R.* 144, and in *Glass v. Beech*, 5 *Ibid.* 173. But the promise must be *express*, and not implied. *Lord Tenterden*, in *Littlefield v. Shea*, 2 *Barn. & Adolph.* 811, admitted the doctrine, that a moral obligation was a sufficient consideration for an express promise, though he said that it must be received with some limitations. It is difficult to surmount the case stated by *Lord Holt*, in 1 *Lord Raymond*, 389, that a promise to pay a debt contracted in infancy is valid. Though the consideration of natural love and affection be sufficient in a deed, yet such a consideration is not sufficient to support an executory contract and give it validity, either at law or in equity.—*Taite v. Hilbert*, 2 *Vesey, Jr.* 111. *Pennington v. Gittons*, 2 *Gill & John.* 208.

38. Is not a written promise by a son, not under seal, to pay the debts of his father, a *nudum pactum* ?

It is, unless some direct consideration moved to him from the creditor, or the latter had bound himself to forbearance, or the like, on the faith of the assumption.—*Parker v. Carter*, 4 *Munford*, 273. *Chandler's Exrs. v. Exrs. of Neale*, 2 *Hen. & Munf.* 124. *Fonblanque on Equity*, by *Lausset*, 273. *Cook v. Bradley*, 7 *Conn. Rep.* 57. And it seems now to be the settled rule, as laid down in a recent case in Maryland, (*Pennington v. Gittings*, 2 *Gill & Johns.* 208,) that the consideration of natural love and affection is sufficient in a deed ; but a mere executory contract cannot be supported on the consideration of blood or natural love and affection. There must be something more—a valuable consideration—or it may be broken at the will of the party.

39. Must it not appear, to make one liable on a promise founded on a moral obligation, that the obligation is strictly and undoubtedly of such a character ?

It must.—*Huroby v. Farran*, 1 *Vermont Rep.* 420.

40. Is a promise to pay, in consideration of forbearance for a short time, sufficient ?

It is not. But it is otherwise if the promise be to forbear for a reasonable or convenient time, either in general or specific terms, or indefi-

nately.—*Sidwell v. Evans*, 1 *Pennsylvania*, 385. *Lindsdale v. Browne*, 4 *Wash. C. C.* 148.

41. Is it not well settled that a general forbearance to sue is to be intended a perpetual forbearance?

It is.—*Sidwell v. Evans*, 1 *Pennsylvania*, 385. *Clark v. Russell*, 3 *Watts*, 313.

42. If a person make a gratuitous promise, and enter on the performance of it, is he not bound by his promise?

He is, and must act with diligence and good faith.—*Rutgers v. Lucet*, 2 *Johns. Cases*, 92.

43. Is not a promise by the legatee to the testator, that he would pay a certain sum of money to another person, in consequence of which the testator omitted to bequeathe the same sum to that person, founded on a sufficient consideration?

It is, and will support notes afterwards executed by the legatee to that person.—*Guallaher v. Guallaher*, 5 *Watts*, 200.

44. Is not an acknowledgment of "value received," in an agreement to indemnify a surety in a note for paying the note, good evidence of consideration?

It is; and such payment by the surety will raise a liability against such promissor.—*Lapham v. Barrett*, 1 *Vermont Rep.* 247.

45. Will it not be a sufficient consideration for a promise, if a creditor of a testator give up his security to the executor, upon his promise to pay the debt?

It will, if he had sufficient assets for the purpose.—*Stebbins v. Smith*, 4 *Pick.* 97.

46. Is a *past* or *executed* consideration sufficient to support an express promise?

In general it is not, unless such consideration was moved by the precedent *request*, either express or under the particular circumstances to be implied, of the party promising; and such request must always be laid in the declaration.—1 *Saund.* 264, note 1. 3 *Chit. Com. Law*, 70. 1 *Chit. Pl.*, 5th ed., 323. *Streeter v. Horlock*, 1 *Bing.* 34. 7 *Moor*, 283, S. C. *Bulkley v. Landon*, 2 *Conn. Rep.* 404. *Comstock v. Smith*, 7 *Johns.* 87. *Chaffe v. Thomas*, 7 *Cowen*, 858. *Lonsdall v. Brown*, 4 *Wash. C. C.* 148. *Livingston v. Rogers*, 1 *Caines*, 548. *Hitchcock v. Litchfield*, 1 *Root*, 206. 16 *Johns.* 284, note. *Yelv.* 41, a., and *American cases there cited.*

47. Is not an entire promise, founded partly on a past and executed con-

sideration and partly on an executory consideration, supported by an executory consideration?

It is.—*Loomis v. Newal*, 15 *Pick.* 159. *Andrews v. Ives*, 3 *Conn. Rep.* 368.

48. Is an indebtedness to three jointly, a sufficient consideration to support a promise to one separately, for his portion of the debt?

It is not, either expressed or implied.—*Vadakin v. Loper*, 1 *Aik.* 287.

49. Will not a contract for the benefit of a third person, support an action by him with whom the contract was made?

It will.—*Leonard v. Vredenburg*, 8 *Johns. Rep.* 39. *Miller v. Drake*, 1 *Caines' N.Y. Rep.* 45. *Livingston v. Rogers*, 1 *Caines' Rep.* 45.

50. Is not an equitable interest in, or a title to land, a good consideration for a promise?

Certainly it is.—*Whitbeck v. Whitbeck*, 9 *Cowen's N.Y. Rep.* 45.

51. Is it not a sufficient consideration if one promise to pay the debt of another; in consideration that the creditor will forbear, and give further time for the payment of the debt?

It is, though no particular time of forbearance be stipulated; the creditor averring that he did thereupon forbear, from such a day till such a day.—*King v. Upton*, 4 *Greenleaf*, 552. *Elting v. Vanderlyn*, 4 *Johns. Rep.* 237. *Lemaster v. Burkhart*, 2 *Bibb*, 25, 30. An agreement by a surety to forbear a suit against his principal when his cause of action should arise, is a good consideration for a promise of indemnity; although at the time of the agreement he had no cause of action against the principal.—*Hamaker v. Eberley*, 2 *Binn.* 506. An agreement by the payee of a promissory note to forbear to sue the maker for one year, is a sufficient consideration of a guarantee by a third person of the payment of the note.—*Sago v. Wilcox*, 6 *Conn. Rep.* 81. But where B gave a bond to A conditioned to pay one hundred pounds on the first of April, 1810, on which C made the following endorsement: "10th April, 1818. I do hereby agree that the within bond shall be paid in one year after the above date. Witness my hand the day and year above written," which was signed C: It was held by the supreme court of Pennsylvania, that without proving a promise by A to forbear to sue B, showing some other consideration, A could not recover from C on his agreement.—*Bixler v. Ream*, 3 *Penn. Rep.* 282.

52. Must there not be a good consideration to support a contract?

Yes, and there must be either a damage to the plaintiff, or advantage to the defendant.—*Cook v. Oxley*, 3 *T. Rep.* 653. And it must import either a benefit to the person for whom the thing is done, or a loss to the party who does it.—*Yates v. Hall*, 1 *Term Rep.* 76. *Townsley v. Sumrell*,

3 *Peters*, 182. *Per Story, J., Forster v. Fuller*, 6 *Mass. Rep.* 58. *Price v. Winston*, 4 *Munf.* 63. *Allaire v. Ouland*, 2 *J. F.* 52. *Stocking v. Sage*, 1 *Conn. Rep.* 519. *Strap v. Anderson*, 1 *Marsh.* 535, 538. *Violet v. Patton*, 5 *Cranch*, 142. *Sumner v. Williams*, 8 *Mass. Rep.* 200. *Per Sewal, J., Miller v. Drake*, 1 *Caines*, 45.

53. Is not a promise *nudum pactum* in the absence of damage or advantage?

It is.—*Cook v. Oxley*, 3 *T. R.* 652. *Coggs v. Bernard*, 2 *Ld. Raym.* 919.

54. Is not the delivery of a note to a third person a good consideration?

It is.—*Tuke's case*, 7 *Mod.*

55. Is not a consideration implied in contracts under seal?

Necessarily so, upon the solemnity of the instrument, and fraud in relation to the consideration is held to be no defence at law: the fraud in respect to the execution of the specialty and going to render it void, is a good defence.—*Dale v. Roosevelt*, 9 *Cowen's Rep.* 307. *The New-York Revised Statutes*, vol. 2, p. 406, sec. 77, 78, declare that a sale is only presumptive evidence of a sufficient consideration, and liable to be rebutted equally as if the instrument was not sealed, provided such a defence be made by plea or by notice under the general issue. This statute provision was an innovation upon the common law rule.—*Case v. Boughton, Wendell's Rep.* 106.

56. Is not a valid and sufficient consideration or recompense for making, or motive or inducement to make, the promise upon which the party is charged, the very essence of a contract not under seal?

It is, both in law and in equity, and must exist although the contract be reduced into writing: otherwise the promise is void, and no action can be maintained thereon.—*Chitty on Contracts*, 22. *Shairington v. Strotton, Plowd. C.* 302, 305, 309. *Dyer*, 90 b. *Dr. & Stud.* 2, c. 24. *Rann v. Hughes in error*, 7 *Term R.* 350. n. a. 7 *Bro. P. C.* 550. *S. C.*, 1 *Fonbl. Tr. Eq.*, 5th edit. 335, n. a. This case (*Rann v. Hughes*, 7 *J. R.* 350, note) is considered as having settled the law, being as it was determined by the unanimous opinions of all the judges in the House of Lords, where the authority of Mr. Justice Wilmot's celebrated argument in *Pillans & Rose v. Van Mierop*, 3 *Burr*, 1663, if not of the case itself, was much and perhaps justly shaken.—*Per Gibson, C. J.*, 3 *Penns. Rep.* 414. *Barrel v. Frussel*, 4 *Taunt.* 117. A bargain without a consideration is a contradiction in terms, and cannot exist.—*Per Lord Loughborough in Mid. v. Lord Kenyon*, 2 *Ves. Jun.* 188. See also a recognition of the principle in the following cases.—4 *Johns. Rep.* 235, 7 *ibid.* 26, 3 *ibid.* 214, 4 *ibid.* 296. 1 *Caines*, 287. 4 *Munf.* 95, 273, 5 *ibid.* 27. 7 *Cowen's*, 332. 3 *Bibb*, 26, 76. 7 *Conn. Rep.* 57. 3 *Desaus*, 310, 341. 2 *Day*, 22. 2 *Hen. & Munf.* 124, 130. 2 *Call*, 258. 17 *Johns. Rep.* 101. 8 *ibid.* 93.

2d edit. *Ex nudo pacto non oritur actio*. The earliest records of our law show that this maxim was also recognized in this country. 11 Hen. 4, 33, 23. a. 17th edit. 4, 4. 3 Hen. 6, 36. Bro. *Action sur le case*, 40. This principle is not peculiar to English law, it obtained generally speaking in the Civil law; and indeed we have borrowed from the Roman jurists, the term *nudum pactum*, as applied to promises without consideration.—2 Blac. C. 445. *Nudum pactum est ubi nulla subest causa præter conventionem*. It is equally a maxim in the French law, that a consideration or cause is essential to the validity of a promise.—*L'obligation sans cause, ou sur une fausse cause, ou sur cause illicite, ne peut avoir aucun effet*. French Code, Civil (1804), Book 3, tit. 2, s. 4. 1 Pothier, Tr. on Obl. p. 1, c. 1, s. 1, art. 3, s. 4.

57. Will the law imply a promise, where there was no express promise?

It will not, nor against the express declarations of the party to be charged, made at the time of the supposed implied undertaking.—*Worthen v. Stephens*, 4 Mass. 448. *Whiting v. Sullivan*, 7 Mass. 107.

58. If a person build a house for his own convenience and accommodation on the land of another; is there any implied agreement on the part of the owner of the land, to pay the value of the house?

None at all.—*Wells v. Bannister*, 4 Mass. 514.

59. Is not a mere written agreement on a footing with a parol contract?

It is, and requires a consideration to support it.—*Brown v. Adams*, 1 Stewart, 51. *Cook v. Bradley*, 7 Conn. 57. *People v. Shall*, 9 Cowen, 778. *Burnet v. Biscoe*, 4 Johns. 235. *Thatcher v. Dinsmore*, 5 Mass. 301.

60. Does not damage, trouble, or prejudice to the promisee, constitute as good a consideration as benefit to the promissor?

It does.—2 Peters, 182. *Per Story*, J. 1 Marsh, 535, 538. 5 Cranch, 142. 8 Mass. Rep. 200. *Per Sewal*, J. 1 Caines, 45. 6 Mass. Rep. 58. 4 Munf. 63. 2 Johns. Cas. 52. 1 Conn. Rep. 519.

61. Is mere inadequacy of consideration a sufficient ground for vacating an agreement otherwise regular?

It is not, when untinctured by fraud or circumvention.—*Knobb v. Lindsay*, 5 Haw. 471. *Stewart v. the State*, 2 Har. & Gill, 114. *Whitefield v. McLeod*, 2 Bay, 380.

But a gross inadequacy of consideration is *prima facie* presumption of fraud.

62. What damages would the court allow, if an agreement be unconscionable?

The court will allow such damages as may appear reasonable, with-

out being bound by the terms of the contract.—*Cutler v. Johnson*, 8 Mass. 365. *Cutler v. How*, 8 Mass. 257.

63. Is not waiver of a legal right, at the request of another person, a good consideration for a promise by him?

It is.—*Stebbins v. Smith*, 4 Peck, 97. *Haiman v. Moulton*, 14 Johns. 466. *Farmer v. Stewart*, 2 N. Hamp. 97. *Nicholson v. May*, 1 Wright, 660.

DELIVERY, AND EFFECT THEREOF.

1. What is the rule of the civil law as to a change of property upon contract of sale?

That the right of property does not vest in the purchaser without delivery, nor even by delivery, without payment of the price, unless the goods were sold on a credit. The risk of the goods was nevertheless thrown on the buyer before delivery, and as soon as the contract of sale was completed, even though the title was still in the vendor.—2 *Kent's Com.* 498, 3d edit. *Inst.* 2, 1, 41. *Ibid.* 3, 24, 3. *Code*, lib. 2, tit. 3, 1, 20. *Dig.* 18, 1, 19. *Bynk. Quæst. Jur. priv. lib.* 3, ch. 15. *Pothier, Traité du Contrat de Vente*, n. 322. *Domat*, b. 4, tit. 5, sec. 2, art. 3.

Before delivery, the vendee had only the *jus ad rem*, and not the *jus in re*.

The Code Napoleon, No. 1538, has dropped the rule of the civil law, and followed that of the English common law; and it holds that the property passes to the buyer as soon as the sale is perfected, without either delivery or payment.

The civil code of Louisiana, 2421, has followed the words of the Code Napoleon.

2. What is the effect of delivery to an agent or servant of the vendee?

It is equivalent to a delivery to the vendee himself; and the delivery of the goods to a carrier or master of a vessel, when they are to be sent by a carrier, or by water, invests the property, with the correspondent risks in the purchaser subject to the vender's right of stoppage *in transitu*.—*Evans v. Martell*, 1 *Ld. Raym.* 271. *Dutton v. Solomons*, 3 *Boss. & Pull.* 582. *Dawes v. Peck*, 8 *Term. Rep.* 330. *Ludlow v. Bowne & Eddy*, 1 *Johns. Rep.* 15. *Summerill v. Elder*, 1 *Binney's Rep.* 106. *Griffith v. Ingledew*, 6 *Serg. and Rawle.* *King v. Meredith*, 2 *Camp. Rep.* 639. *Copeland v. Lewis*, 2 *Starkie's N. Rep.* 33.

A delivery by the consignor of goods, on board of a ship chartered by the consignee, is a delivery to the consignee; and the rule is the same if they were put on board a general ship for the consignee.—2 *Kent's Com.* 499, 3d edit. *Coxe v. Harden*, 4 *East's Rep.* 211. *Brown v. Hodgson*, 2 *Camp. Rep.* 36. *Groning v. Mendham*, 5 *Maul. & Selw.* 189.

3. What is the effect of a symbolical delivery ?

It is in many cases equivalent to actual delivery. The delivery must be such as the nature of the case admits. The delivery of the key of a warehouse in which goods sold are deposited, or transferring them on the warehouse-man or wharfinger's books, to the name of the buyer, is a delivery sufficient to transfer the property. So the delivery of the receipt of the store-keeper for the goods, being the documentary evidence of the title, has been held to be a constructive delivery of the goods.—2 *Kent's Com.* 500, 3d ed. *Lord Hardwick*, 1 *Atk. Rep.* 171. *Lord Kenyon*, 7 *Term Rep.* 71.

The bill of sale of timber, and materials of great bulk, lying on the banks of a canal, or marking the timber, has been held to be a delivery sufficient to make the possession follow the right.

4. What is necessary to constitute a part acceptance, so as to take the case out of the statutes ?

That there must have been such a dealing on the part of the purchaser as to deprive him of the right to object to the quantity of goods, or to deprive the seller of his right of lien. But the facts and circumstances which may amount to an acceptance of part of the goods sold, have been a fruitful source of discussion, and subtle distinctions have been raised and adopted. In Scotland it has been held, that where the commodity, like a cargo of grain, requires a protracted course of delivery, and only part had been delivered, the residue undelivered in point of fact, was not deemed delivered in point of law, so as to exempt it from the creditors of the seller.—*Collins v. Markis' Creditors*, 1 *Bell's Comm.* 173, n. 2 *Kent's Comm.* 495.

If any thing remains to be done, as between the buyer and seller, before the goods are to be delivered, a present right of property does not attach in the buyer.—6 *East's Rep.* 614. *Withers v. Lyss*, 4 *Camp. Rep.* 237. *Wallace v. Breeds*, 13 *East's Rep.* 522. *Busk v. Davis*, 2 *Maule & Selw.* 397. *Shepley v. Davis*, 5 *Taunt. Rep.* 617. *McDonald v. Hewett*, 15 *Johns. Rep.* 349. *Barrett v. Goddard*, 3 *Mason's Rep.* 112. 2 *Kent's Comm.* 496, 3d edit.

The goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass.—*Austin v. Craven*, 4 *Taunt. Rep.* 644. *White v. Wilkes*, 5 *Ibid.* 176. *Outwater v. Dodge*, 7 *Cowen's Rep.* 210. It is a fundamental principle, pervading everywhere the doctrine of sales of chattels, that if goods be sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller, until the specific property be separated and identified.—*Vinius' Comm. in Inst.* 3, 24, 3, § 4. *Pothier, Traité du Contrat de vente*, 380. *Zagury v. Turnell*, 2 *Camp. Rep.* 240. *Simmons v. Swift*, 5 *Barnw. & Cress.* 857.

Taking a bill of parcels, and an order from the vendor on the store-keeper for the goods, and going and marking them with the initials of one's name, has been held a delivery.—*Hollingsworth v. Napier*, 3 *Caines' Rep.* 182.

The mere communication of the vendor's order on a wharfinger or warehouse-man for delivery, and assented to by him, passes the property to the vendee.—*Lucas v. Dorian*, 7 Term Rep. 270. *Searle v. Reeves*, 1 Esp. Rep. 598. *Bentall v. Burn*, 3 Barnw. & Cress. 423.

Delivery of a sample has been held sufficient to transfer the property, when the goods could not be actually delivered until the seller had paid the duties; that fact being known and understood at the time, and when the buyer accepted of the samples as part of the quantity purchased.—*Hinde v. Whitehouse*, 7 East's Rep. 558. But generally as a substitute for actual or constructive delivery, taking of samples has no effect.—*Hill v. Buchanan*, cited in note to 1 Bell's Comm. 182. 2 Kent, 502.

If the subject matter of the contract does not exist in *rerum natura*, at the time of the contract, but remained to be thereafter fabricated out of raw materials, it is consequently incapable of delivery, and not within the statute of frauds; and the contract is valid without a compliance with its requisitions.—2 Kent, 504. *Groves v. Buck*, 3 Maule & Selw. 178.

5. What is the rule in the construction of contracts, as to the place of delivery, where no place is expressed?

The general rule is, that the articles are to be delivered where they are at the time of the sale.—2 Kent's Comm. 505. *Pothier, Traité des Obligations*, No. 512. *Traité du Contrat de vente*, No. 45, 46, 51, 52. *Code Napoléon*, n. 1609. *Toulier, Droit Civil Français*, Tome VII. n. 90. *Civil Code of Lou.*, art. 2460. *Adams v. Minnick*, cited in *Whart. Dig. Penn. Cas. tit. Vendor*, n. 76. *Lobdell v. Hopkins*, 5 Cowen's Rep. 516. *Chip. on Contracts*, 29, 30. 1 *Goodwin v. Holbrook*, 4 *Wendell's Rep.* 380.

Pothier distinguishes between contracts for a thing certain, as for all the wine of the vintage of the vendor, and a contract for any thing indeterminate, as a pair of gloves, a certain quantity of corn, wine, &c. In the former case, the delivery is to be at the repository where the wine was at the time of the contract. In the latter case, the property is to be delivered at the debtor's place of residence, unless the parties lived near each other, and the thing be portable, in which case the place of payment would be the creditor's residence.—*Pothier, Traité des Oblig.*, No. 512, 513.

The common law on the subject of the delivery of specific articles, which are portable, makes a distinction between the contract of sale and a contract to pay a debt at another time in such articles. We have seen that in the contract of sale the delivery is to be at the place where the vendor has the article; but in the other case the weight of authority would seem to be in favor of the rule, that the property was to be delivered at the creditor's place of residence.—2 Kent, 506.

STOPPAGE IN TRANSITU.

1. What is the rule as to vendor's right of stoppage *in transitu*?

The right exists only between the vendor and vendee. It is the

right which the vendor, when he sells goods on credit to another, has of resuming the possession of the goods, while they are in the hands of a carrier or middle-man in their transit to the consignee or vendee, and before they arrive into his actual possession, or to the destination which he has appointed for them, on his becoming bankrupt or insolvent. If the price be paid or tendered for the specific goods in question, the vendor cannot retain them for money due on other accounts. The vendee or his assignees may recover the goods, on payment of the price; and the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment.—*Kymer v. Suwercropp*, 1 *Camp. Rep.* 109. If he has been paid in part, he may stop the goods for the balance due him, and the part payment only diminishes the lien *pro tanto* on the goods detained.—*Hodgson, v. Loy*, 7 *Term. Rep.* 440. *Feise v. Wray*, 3 *East's Rep.* 93. 2 *Kent*, 541.

The right extends to every case in which the consignor is substantially the vendor; and it does not extend to a mere surety for the price. As between principal and factor the right does not exist. A principal who consigns goods to his factor upon credit, is entitled to stop them if the factor becomes insolvent. The vendor's right is so strongly maintained, that while the goods are on the transit, and the insolvency of the vendee occurs, the vendor may take them by any means not criminal. It is not requisite that he should obtain actual possession of the goods before they come to the hands of the vendee; nor is there any specific form requisite for the stoppage of goods *in transitu*; though it is well settled that the bankruptcy of the buyer is not of itself tantamount to a stoppage *in transitu*.

2. How may the right of stoppage *in transitu* be defeated?

By the actual delivery to the vendee, or by circumstances which are equivalent to actual delivery. There are cases in which a constructive delivery will, and others in which it will not, destroy the right. If the goods have arrived at the warehouse of the packer, used by the buyer as his own, or they are landed at the wharf where the goods of the vendee were usually landed and kept, the *transitus* is at an end, and the right of the vendor extinguished.—*Snee v. Prescott*, 1 *Atk. Rep.* 248. *Stokes v. La Rivière*, cited in 3 *Term Rep.* 466, & 3 *East's Rep.* 397. *Ellis v. Hunt*, 3 *Term Rep.* 464. *Richardson v. Gross*, 3 *Boss. & Pull.* 118. *Scatt v. Petit*, 3 *Boss. & Pull.* 469. *Smith v. Gross*, 1 *Camp. Rep.* 382. *Lord Alvanley*, in 3 *Boss. & Pull.* 48. *Dutton v. Solomonson*, 3 *Boss. & Pull.* 582. *Rowe v. Pickford*, 3 *Taunt. Rep.* 83. *Tucker v. Humphrey*, 4 *Bingham's Rep.* 516.

The delivery to the master of a general ship, or of one chartered by the consignee, is a delivery to the vendee, or consignee, but still subject to this right of stoppage. And yet, if the consignee had hired the ship for a term of years, and the goods were put on board to be sent by him on a mercantile adventure, the delivery would be absolute, and it would bar the right of stoppage.—*Fowler v. Kymer*, cited in 3 *East's Rep.* 396. *Wright v. Lawes*, 4 *Esp.*

OF CONTRACTS TO MARRY.

1. Must not a contract to marry be reciprocal, and obligatory on both the parties?

In general they must.—*Chitty on Contracts*, 425. *Hebden v. Rutter*, 1 Sid. 180. *Rutter v. Hebden*, 1 Lev. 147. *Harrison v. Cage*, Carth. 467. 1 Bla. Com. 433, *Chitty's ed. & id.*, notes 1, 2. 4 G. 4. c. 76. 6 G. 4, c. 92.

2. May not an action on such a contract be maintained by a man against a woman?

It may, for if the promise of the latter be void, the engagement of the man would be *nudum pactum*.—*Harrison v. Cage*, Lord Raym. 386. 1 Salk. 24, S. C. A promise to pay money in consideration of discharging or disengaging the defendant from his promise to marry the plaintiff is binding; and it is sufficient to aver generally that the plaintiff did *discharge* or disengage the defendant, &c., without showing how.—*Baker v. Smith*, cited in *Aghionty v. Townerson*, Sir T. Raym. 400. A bill in equity lies to compel a discovery, whether a party had promised marriage.—*Vaughan v. Aldridge*, Forest's R. 42. *Chitty on Contracts*, 425.

But in a case of an infant, whose promise is voidable, an exception exists: as an infant may sue, though not liable to be sued, for a breach of promise to marry.—*Holt v. Ward*, Stra. 837, 950. *Fitzgid*, 175, 275. 1 Chip. 252. 1 Marsh. Ky. Rep. 78.

3. Is an engagement to marry binding, where no precise time for completing it, is agreed upon?

It is, and in such case the law presumes that the parties promised to intermarry in a reasonable or convenient time, upon request.—*Chitty on Contracts*, 426. *Harrison v. Cage*, Carth. 467. 1 Lord Raym. 386, S. C. *Potter v. Deboos*, 1 Stark. R. 82. *Atchinson v. Baker*, Peake's *Additional Cases*, 103. And where the defendant stated to the father of the plaintiff that he had "pledged himself to marry his daughter in six months, or a month after Christmas," Lord Ellenborough left it to the jury "whether they would not presume, from the circumstances, a general promise to marry, (which the law would consider as a promise to marry within a reasonable time,) and whether the declarations of the defendant had any other effect than to render that definite and certain, which before was uncertain."—*Potter v. Deboos*, and see *Phillips v. Crutchley*, 3 C. & P. 178. 1 M. & P. 239, S. C. Where the promise was to marry on request, a special request must be laid in the declaration, and proved at the trial, unless the defendant, by marrying another person, has incapacitated himself from performing his engagement, and the declaration state that fact.—*Harrison v. Cage*, 1 Lord Raym. 386. And see *Phillips v. Crutchley*, and *Gough v. Farr*, 3 C. & P. 631. 1 Y. & J. 477, S. C. See 2 Stark. Ev. 942, n. 1.

But it was always held to be unnecessary to aver or prove that the

plaintiff, when making the request, was accompanied by a clergyman.—*Holder v. Dickenson*, 1 *Freem.* 95. *Dickenson v. Halcroft*, 3 *Keb.* 148. *Harrison v. Cage*, 1 *Lord Raym.* 386. *Carth.* 467, S. C. The defendant's statement to the plaintiff's father, that he did not mean to perform his promise, is a sufficient breach.—*Gough v. Farr*, 3 C. & P. 631. 1 M. & J. 477, S. C.

4. Will the pre-engagement of the defendant to another person form any defence to the action ?

Not at all, as he could not thus avail himself of his own wrong ; but if the parties be related within the *levitical* degrees, and their intermarriage be therefore prohibited, their promises are nugatory, and the breach thereof would consequently afford no ground of action.—*Harrison v. Cage*, *Lord Rayn.* 387. *Chitty on Contracts*, 427.

In an action for breach of promise of marriage, the defence was, that the plaintiff was a woman of bad character, and evidence was given of one instance of gross misconduct ; and Lord *Kenyon* admitted a witness to state the character which he had heard of her in the neighborhood in which she lived : observing, “ that character was the only point in issue, that is, public opinion, founded on the conduct of the party, and was a fair subject of inquiry, and therefore, what the public thought, was evidence on such an issue.” In a subsequent case, it appeared that after the promise the plaintiff had had a child. *Abbott, C. J.*, observing to the jury that, if they thought the defendant was not the father of the child, he was entitled to their verdict.—*Foulkes v. Sellway*, 3 *Esp. R.* 236 ; and per Lord *Kenyon*, in *Atchinson v. Baker*, 3 *Mass.* 189. 1 *Johns. Cas.* 416. *Irving v. Greenwood*, 1 C. & P. 350. In this case evidence that the parents of defendant disapproved of the match, was allowed to be received in mitigation of damages.—*Verdict for the plaintiff, damages £500.* See farther on this subject, *Chitty on Contracts*, 427.

5. If a promise to marry be made by the defendant, in consideration that the plaintiff *would* have connection with him, is it valid ?

It is not, it is void ; but it seems that if he renew his promise after the illicit intercourse had taken place, the subsequent promise will be binding.—*Chitty on Contracts*, 428. *Morton v. Fenn*, 3 *Dougl.* 211, P. R. 151. In the course of a cause of this description, the defendant gave in evidence many expressions used by the plaintiff at different times ; in which, speaking of the defendant, a lady, he gave great proof of want of feeling, as well as of gross manners and sentiments. In summing up to the jury, Lord *Ellenborough* said, “ that notwithstanding what had passed, and the promise of marriage proved, if the plaintiff had conducted himself in a brutal or violent manner, and threatened to use her ill, a woman under such circumstances had a right to say she would not commit her happiness to such keeping ; and she might set up such defence, and it would be legal ; but though no such evidence appeared which went to the ground of action, if the plaintiff appeared to be of gross manners, and destitute of feeling, as he complained in this action of an injury, in the loss of the *society* of a

woman, which he appeared never to have valued, and the pleasures of which society he seemed little calculated to taste, the jury should take it into their consideration in the verdict they were to pronounce."—*Chitty on Contracts*, 428. *Leeds v. Cook*, 4 *Esp. R.* 257.

6. Is it not a sufficient excuse for the non-performance of marriage, that a person upon inquiry turns out to be of a bad character?

Gibbs, C. J., at *Nisi Prius*, held it to be, in the case of *Bradley v. Mortlock*, 1 *Holt, N.* But mere accusation and suspicion are not sufficient; the charges which she makes against him must, if capable of proof, be substantiated, or they go only to the damages, and such damages in a case tried in the United States, *Southard v. Rexford*, 6 *Cowen*, 254, were left to the sound discretion of the jury.

7. Will a promise of marriage be binding, if it be obtained, or the continuation of the engagement be procured, by means of a fraudulent and false representation to the defendant, or wilful concealment from him of the plaintiff's former situation in life, and the circumstances of her family?

It seems not.—*Wharton v. Lewis*, 1 *C. & P.* 529. *Foot v. Haynes*, *Id.* 546.

8. How are contracts in restraint of marriage held?

If the object or effect of the contract is to restrain or prevent a party from marrying *any person*, it is void.—*Chitty on Contracts*, 522.

CONSTRUCTION OF CONTRACTS.

1. What is the principal object of inquiry in the construction of contracts?

The mutual intention of the parties to the instrument: to reach and carry that intention into effect, the law, when it becomes necessary, will control even the literal terms of the contract, if they manifestly contravene the purpose; and many cases are given in the books in which the plain intent has prevailed over the strict letter of the contract.—*Co. Litt.* 45, a, 301, b. *Lord Hardwicke*, in 2 *Atk. Rep.* 32. *Lord Ch. J. Willes*, *Parkhurst v. Smith*, *Willes' Rep.* 332. *Hotham, B. and Thompson, B.*, 1 *H. Bl. Rep.* 385, 386, 595. *Lord Kenyon* in *Tallock v. Harris*, 3 *Term Rep.* 181. *Pothier, Traité des Oblig.*, No. 91.

In furtherance of the rule that the intention of the parties is to be ascertained, it is another principle, that plain unambiguous words need no interpretation. Words are to be taken in their natural and obvious meaning, unless some good reason be assigned to show that they should be understood in a different sense.—2 *Kent*, 555.

2. What is the rule of interpretation, where the intention of the parties is doubtful, or not readily perceived?

It is to be sought after by a reference to the context, and to the nature of the contract; it must be a reasonable construction, and according to the subject matter and motive.—*Ashurst, J.*, 1 *Term Rep.* 703. *Best, Ch. J.*, 2 *Bing. Rep.* 519. The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. It is to be sought, also, by a reference to the usage of the place, or the *lex loci*, according to another of the maxims of interpretation in the civil law. If it be a mercantile case, and the instrument be not clear and unequivocal, the usage of trade will enable us frequently to determine the precise import of particular terms, and the certain intention declared by the use of them.—*Webb v. Plummer*, 2 *Barn. & Ald.* 746. *Coit v. Com. Ins. Co.*, 7 *Johns. Rep.* 385. *Gibbon v. Young*, 8 *Taunt. Rep.* 261. *Mr. Justice Story*, in his *Commentaries on the Conflict of Laws*, p. 225, 233, has enforced by numerous authorities, and by illustrations, the general rule, that in the interpretation of contracts, the law and custom of the place of the contract is to govern.

3. What is the rule as to the admission of parol evidence in the construction of written contracts?

The inflexible rule is, that parol evidence is not admissible to supply or contradict, enlarge, or vary the words of a written contract. That would be the substitution of parol for written evidence under the hand of the party, and it would lead to uncertainty, error and fraud.—*Piersons v. Hooker*, 3 *Johns. Rep.* 68. *Jackson v. Foster*, 12 *Ibid*, 448. Parol evidence is received, when it goes, not to contradict the terms of the writing, but to defeat the whole contract, as being fraudulent or illegal. So when a contract is reduced to writing, all matters of negotiation and discussion on the subject, antecedent to, and *dehors* the writing, are excluded as being merged in the instrument.—*Abbott, Ch. J.*, in *Kain v. Dodds*, 2 *Barn. & Cress.* 627. *Parkhurst v. Van Cortlandt*, 1 *Johns. Ch. Rep.* 273. *Dean v. Mason*, 4 *Conn. Rep.* 428. 2 *Kent*, 556.

4. What is the rule for construing the language in a deed?

That the language of a deed or contract is to be taken most strongly against the party using it. This applies only to cases of ambiguity in the words, or where the exposition is requisite to give them lawful effect. The modern and more reasonable practice is to give the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction. The true principle of sound ethics is, to give the contract the sense in which the person making the promise believed the other party to have accepted it.—2 *Kent*, 556.

5. Is not a parol agreement for the sale of land, merged in the deed subsequently given?

It is.—*Falconer v. Garrison*, 1 *McCord's S. Car. Rep.* 209. And an action will not lie to recover back money paid on a parol contract for the

sale of lands, where there has been no default on the part of the vendor.—*Dowdle v. Camp*, 8 *Johns. N. Y. Rep.* 451.

6. Where lands are sold in gross, will any allowance be made for excess or deficiency ?

Not in executory contracts. But a different rule prevails in executed contracts.—*Shelby et al. v. Smith's Heirs*, 2 *Marsh. Ky. Rep.* 513.

7. If a person having an election to repudiate a contract, does any act which admits the existence of it, is he not bound by the contract ?

He is.—*Knox v. Hook*, 12 *Mass. Rep.* 329. *Shaw v. Bradstreet*, 13 *Mass. Rep.* 24. *Proprietors of Kennebeck Purchase*, 1 *Greenleaf's Rep.* 348. It appeared in evidence, that Tibbetts contracted for the purchase of a lot of the plaintiff, and give his notes, within a reasonable time, but neglected to give them, and Tibbetts remained in possession of the premises and sold his interest in them to another, who undertook to pay the notes. Here Tibbetts by the act of selling his interest acknowledged the contract as valid, and the court, *Mellen, Ch. J.*, presiding, said, the defendant might have repudiated the contract on the ground that the deed was not delivered in a reasonable time, but as his acts amount to an admission of the contract, he cannot now elect to treat it void.

8. Is an offer without acceptance a contract ?

It is not.—*Tucker v. Woods*, 12 *Johns. N. Y. Rep.* 190. *Livingston v. Rogers*, 1 *Caines' Rep.* 584.

9. What does the word "immediately" in a contract mean ?

That the thing should be done without any unusual delay.—*Fitzhugh et al. v. Jones*, 6 *Munf. Va. Rep.* As where one party agrees to purchase and the other to convey.—*Bank of Columbia v. Hagner*, 1 *Peters' U. S. Rep.* 455.

10. Does not the law imply that the party undertaking to do a particular thing, has engaged to do it in a workmanlike and skilful manner ?

It does.—*Streeter v. Horlock*, 7 *Moore*, 287. And if no specific sum be agreed upon, he is entitled to a reasonable compensation, which is to be ascertained by a jury.—*Peacock v. Peacock*, 2 *Campb. N. P. Rep.* 45.

11. Where no specific sum is fixed by the parties to the contract, is not a subsequent promise to pay an additional sum a *nudum pactum* ?

It is.—*Harris v. Watson, Peake N. P.* 72.

12. Is not a promise to work gratuitously a *nudum pactum* ?

It is.—*Harris v. Watson, Peake N. P.* 72, 75.

13. Where the parties agree as to the time and manner of payment, are they not bound by it?

They are, and the party cannot set up a claim to the possession of the thing—the subject of the contract—inconsistent with that agreement.—*Chase v. Wetmore*, 5 M. & S. 180.

14. Is not a contract to be construed according to its popular and legal sense and meaning?

It is.—*Robertson v. French*, 4 East, 135. The same principle prevails both in law and equity.—1 *Hotham v. The East India Company*, 1 Doug. 277. They are, however, to be construed most strongly against the contractor.—2 B. & P. 22.

15. When the contract is express, can any custom or usage of trade influence it?

It cannot.—*Yates v. Pim*, Holt N. P. Rep. 95, *Pothier*, Part 1, c. 1, § 1, Art. 7. Where he says, in case of doubt, a clause ought to be interpreted against the person who stipulates any thing, and in discharge of the person who contracts the obligation.

16. Does not any important alteration, made without the knowledge or consent of the party, invalidate it?

It does.—*Powel v. Divett*, 15 East, 29. *Reeve v. Jennings*, 2 Yeat. 107. *Hall et al. v. Stewart*, 5 Day's Conn. Rep. 428.

17. Does a parol agreement, to give a bond to re-convey, by the grantee, make the deed of conveyance a mortgage?

It does not.—*Harrison v. Trustees of Phillips' Academy*, 12 Mass. Rep. 456. *Lund v. Lund*, 1 New Hamp. Rep. 39. *Erskine v. Townsend*, 2 Mass. Rep.

18. Does a contract to sell and convey lands, upon the performance of certain acts, to be performed by the purchaser at a future period, give a license to enter?

It does not of itself.—*Cooper v. Stoner*, 9 Johns. N. Y. Rep. 331. *Suffren v. Townsend*, 9 Johns. Rep. 34. It is the implied condition of every contract for work or labor, that it shall be properly done.—*Lewis v. Blanchard*, 20 Martin's Lou. Rep. 290. *Graham v. Weeks*, 20 Martin's Rep. 190.

19. Are not all conversations, leading to a contract, merged in it?

They are.—*Gilpin v. Consequa*, 1. Peters' C. C. U. S. Rep. 87.

20. Is not a contract reduced to writing supposed to contain all contemporaneous declarations?

It is.—*Osgood v. Lewis*, 2 *Har. & Gill*, 495. *Addms et al. v. Ray*, 8 *Conn. Rep.* 11. *Stewart v. The State*, 2 *Har. & Gill*, 114.

21. May not the words "grant, bargain, and sell," be construed a mere agreement to convey, and not a conveyance?

They may, and it may be varied by a subsequent parol agreement.—*Sherman v. Dill*, 4 *Yates*, 295. *Stoufer v. Coleman*, 1 *Yeates' Penn. R.*

22. Must not technical terms, in a written contract, have a technical interpretation?

They must.—*James v. Bostwick*, 1 *Wright*, 143. *Ellmaker v. Ellmaker*, 4 *Watts*, 89.

23. What must a promise be understood to mean, to pay a certain sum in the wares of a particular trade?

It must be understood to mean such articles as are entire, and of the kind and fashion in ordinary use, and not such as are antiquated and unsalable.—*Dennott v. Short*, 7 *Greenleaf*, 150.

24. Can usage of trade be set up, either to contravene an established rule of law, or to vary the terms of an express contract?

It cannot; but all contracts made in the ordinary course of business, without particular stipulations, express or implied, are presumed to be made in reference to any existing custom, relating to such trade; and it is always competent for a party to resort to such usage, to ascertain and fix the terms of the contract.—*Sewal v. Gibbs*, 1 *Hall's Rep.* 602. *Rainkin v. The American Insurance Company*, 1 *id.* 619.

25. Is a person entering into a contract, bound by the usage of a particular business?

He is not, unless it be so general as to furnish a presumption of knowledge, or it is proved, he was acquainted with it.—*Stephen v. Reeves*, 9 *Pick.* 198.

26. Where several instruments in writing are made at the same time, between the same parties, and relating to the same subjects, do they not constitute but one agreement?

They do.—*Stephen v. Baird*, 9 *Cowen*, 274. *Makepeace v. Harvard College*, 10 *Pick.* 302. *Sibley v. Holden*, 10 *Pick.* 250. *Hunt v. Livermore*, 5 *Pick.* 395. And the court will presume such a priority in the execution of them, as will best effect the intent of the parties.—*Newhall v. Wright*, 3 *Mass.* 138. Where there are two instruments, one full and explicit as to the intent and meaning of the parties, the other general, but referring to, and adopting the stipulations contained in the former, in giving a construction to the agreement of the parties, both instruments will

be considered as forming but one agreement.—*Rogers v. Kneeland*, 13 *Wend.* 114.

27. What does a sale for improved endorsed paper mean in law ?

It means a sale for paper which ought to be approved, and not for paper such as the seller may approve.—*Guier v. Page*, 4 *Serg. & Rawle*, 1.

28. Where a contract is susceptible of two interpretations, will not that one be given to it, that will make valid, and accord with what is reasonable ?

It will.—*Falcon's Admrs. v. Harris*, 2 *Hen. & Munf. Va. Rep.* 550. *Monroe et al. v. Henaire et al.* 10 *Martin's Lou. Rep.* 357.

29. Are not instruments made at the same time, relating to the same matter, to be construed together ?

They are.—*Penniman v. Hatshorne*, 13 *Mass. Rep.* 87. *Hunt v. Livermore*, 5 *Pick.* 395. *Makepeace v. Harvard College*, 10 *Pick. Mass. Rep.* 298. *Stocking v. Fairchild*, 5 *Pick. Rep.* 181. And the court will look at the subject matter of the transaction, and give one instant a priority to another.—*Fowle v. Bigelow*, 10 *Mass. Rep.* 370. *Hopkins v. Young*, 11 *Mass. Rep.* 302. *The Taunton and South Boston J. Carr v. Whiting*, 10 *Mass. Rep.* 327. And for that purpose the court will receive extraneous evidence.—*Johnson v. Johnson*, 11 *Mass. Rep.* 359. *Fowle v. Bigelow*, 10 *Mass. Rep.* 379. *Murray v. Hatch*, 6 *Mass. Rep.* 477. *Homer v. Dorr*, 10 *Mass. Rep.* 26.

30. In the construction of contracts, will not the court be strongly inclined to construe it a dependent promise ?

They will, whether the promise be dependent or independent.—*Bank of Columbia v. Hagner*, 1 *Peters' U. S. Rep.* 465.

31. Where a freight is to be paid after the return of a vessel, is not the return a condition precedent ?

It is.—*Hamilton v. Warefield*, 2 *Gill & Johns. Md. Rep.* 482.

32. Does not a covenant to convey a title, mean a legal estate, free from all claims ?

It does, and is a condition precedent.—*Sprinkle v. Miller's Exec'rs*, 6 *Munf. Rep.* 170. *Clute v. Robinson*, 2 *Johns. Rep.* 613. *Vide Jones v. Gardner*, 10 *Johns. Rep.* 266. *Moss v. Stipp*, 3 *Mun. Va. Rep.* 159.

33. In a contract for the payment of money, when no time is expressed, when is it payable ?

Immediately.—*Thompson v. Ketchum*, 8 *Johns. N. Y. Rep.* 146. *S. C. Johns. Rep.* 285.

Per Cur. Kent, J. The evidence was not admissible. The time of payment is part of the contract, and if no time be expressed, the law adjudges the money is payable immediately. This is not only a positive rule of common law, but is a general principle in the construction of contracts, and it is perfectly in accordance with *Hoar et al. v. Graham et al.* 3 Camp. 57. *Hogg. v. Smith et al.* 1 Taunt. 347.

Or on demand.—*Bank of Columbia v. Hagner*, 1 Peters' U. S. Rep. 455.

Per Cur. Thompson, J. When no specific time for the payment of money is fixed in a contract, by which the same is to be paid by one party to the other in judgment of law, the same is payable on demand.

34. Will not a contract for the sale of lands, signed and sealed by the vendor, in which there is a covenant by the vendee to pay the consideration money, and accepted by him, support an assumpsit by the vendor?

It will.—*Gale v. Nixon et al.* 6 Cowen's N. Y. Rep. 445. *Roget v. Merrit et al.* 2 Caines' Rep. 120. And a purchaser of the vendee takes the contract with the same limitations as it was subject to in the hands of the vendee.—*Bungardner et al. v. Allen*, 6 Mun. Va. Rep. 439.

And a recognition of a contract under seal will not sustain an action of covenant.—*Gall v. Nixon*, 6 Cowen's Rep. 445.

35. Is an express promise to pay, necessary to enable an assignee of a chose in action to sue in his own name?

It is not.—*Badger & Wife's Ex'rs. v. Collins*, 7 Harr. & Johns. Md. Rep. 213. *Scott v. Lancaster*, 3 Harr. & Johns. 441. *Alston's Adm'rs v. Contee's Ex'rs*, 4 Har. & Johns. 351.

The reverse in Kentucky.—*Jarman v. Howard*, 3 Marshall's Ky. Rep. 383.

36. Will not the court annul a contract, which the defendant has failed to perform, and cannot perform?

It will.—*Skillern's Ex'rs v. May's Ex'rs*, 4 Cranch's U. S. Rep. 137.

37. May not a contract by words be discharged by words?

It may.—*Seymour v. Minturn*, 17 Johns. N. Y. Rep. 169. *Hotchkiss v. Downes*, 2 Conn. Rep. 136.

Per Cur. Spencer, J. C. A promise by words may be discharged by words, before breach, where there is an agreement upon an adequate consideration, to pay a certain sum, the promissor cannot avoid that agreement by an agreement to receive a less sum.

38. Must not in a contract for labor, for a specified time, for a certain price, the whole time be performed?

It must.—*M' Millan v. Vanderlip*, 12 Johns. N. Y. Rep. 166.

39. Is not a contract most strongly construed against the grantor?

It is.—*Judkins et al. v. Earl et al.*, 1 *Greenleaf Me. Rep.* 9. *Withers v. Thompson*, 4 *Munroe's Rep.* 429.

40. Is not the meaning of the parties to be regarded in the construction of contracts?

It is.—*Harper v. Hampton*, 1 *Har. & Johns. Mary. Rep.* 672. *Morrison v. Gallaway*, *ibid.*, 658. *Fallow v. Martin*, 1 *Harper's S. C. Rep.* 410. And it is to be construed in reference to the law as it existed when the contract was made.—*White et al. v. Noland*, 15 *Martin's Lou. Rep.* 636. *Belcher v. Com'rs of the Orphan House, Charleston*, 2 *M'Cord's S. C. Rep.* 23.

41. Are not contracts supposed to be made in reference to existing laws, where they are entered into?

They are; and cannot be made in violation of the laws of the place.—*Belcher v. The Com'rs of the Orphan House*, 23 *Cost. Rep. S. C.* *Sabatier et al. v. Their Creditors*, 18 *Martin's Lou. Rep.* 585. *Patton v. Nicholson*, 3 *Wheaton*, 204. *Hall v. Mullin*, 5 *Har. & Johns. Md. Rep.* 190.

42. Does a repeal of a law divest the right acquired under it?

It does not.—*Fletcher v. Peck*, 6 *Cranch U. S. Rep.* 135.

Per Cur., *Marshall, C. J.*, when a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.

43. In the construction of contracts, is not the *lex loci* to govern?

It is, unless the parties intend it differently.—*Dixon's Ex'rs v. Ramsay's Ex'rs*, 3 *Cranch U. S. Rep.* 323. *De Sobrey v. De Laister*, 2 *Har. & Johns. Md. R.* 228. *Miles v. Oden et al.* 20 *Martin's R.* 214. *Morris v. Eaves*, 11 *Martin's Rep.* 730. *Gray v. Gardner*, 17 *Mass. R.* 178. *De Couch v. Saretier*, 3 *Johns. N. Y. Ch. R.* 211. *M'Candish v. Cruger*, 2 *Bay's S. C. Rep.* 377. *Blanchard v. Russel*, 13 *Mass. R.* 4. *Barral v. Benjamin*, 15 *Mass. Rep.* 357. *Byrne v. Crowningshield*, 7 *Mass. Rep.* 56.

OF WARRANTY.

1. Is any particular phraseology requisite to constitute a warranty?

It is not; any representation of the state of the thing sold, or any direct and express affirmation, by the vendor, of its quality and condition, showing an intention to warrant its soundness, will be sufficient.—*Cramer v. Bradshaw*, 10 *J. R.* 484. *Roberts v. Morgan*, 2 *Cow.* 438. *Seixas v. Woods*, 2 *Caincs*, 59. *Per Kent, J.*, *The Oneida Manufacturing Society v. Lawrence*, 4 *Cowen*, 440.

2. Is it not a well-established rule that a promise must be in writing, to answer for the debt, default, or miscarriage of another person, collateral to the principal contract?

It is, though made on sufficient consideration. This rule is established by many authorities of high standing, a few of which I here mention.—*Floyd v. Harrison*, 4 *Bibb*, 76. *Tileston v. Nettleton*, 6 *Pick*. 509. *Sears v. Brink*, 3 *J. R.* 211. *Leland v. Creyan*, 1 *M'Cord*, 100. *Simpson v. Pattern*, 4 *J. R.* 422. *Jackson v. Raynor*, 12 *J. R.* 291. *Waggoner v. Gray*, 2 *Hen. & Munf.* 503. *Turner v. Hubbard*, 2 *Day*, 457. *Peabody v. Harvey*, 5 *Conn. Rep.* 119.

And the law is also well settled, that if the person on account of whose debt, default, or miscarriage, the undertaking is made, be in any manner liable for the same, so that the whole responsibility does not rest upon the guarantor, the undertaking is collateral. This principle is illustrated by the following cases.—*Simpson v. Pattern*, 4 *J. R.* 422. *Jackson v. Rayner*, 12 *J. R.* 291. *Peabody v. Harvey*, 4 *Connecticut Report*, 119. *Huntingdon v. Harvey*, 1 *id.* 124. *Gallagher v. Brunnell*, 6 *Cowen*, 346. *Floyd v. Harrison*, 4 *Bibb*, 76. *Elting v. Vanderlyn*, 4 *J. R.* 237. *Tileston v. Nettleton*, 6 *Pick*. 509. *Waggoner v. Gray's Admrs.*, 2 *Hen. & Munf.* 603.

But if the party for whom the promise is made, be under no liability on account of the particular debt, default, or miscarriage for which the guaranty is given, and the whole responsibility be assumed by the promissor, the undertaking is original, and not within the statute. Upon the preceding general principle, the following cases were decided.—*Gold v. Philips*, 10 *J. R.* 412. *Myers v. Morse*, 15 *J. R. Rep.* 425. *Chase v. Day*, 17 *J. R. Rep.* 114. *Singerland v. Morse*, 7 *J. R.* 463. *Mease v. Wagner*, 1 *M'Cord*, 395. *Madden v. M'Cray*, 1 *id.* 486. *Harrison v. Sawtel*, 10 *J. R.* 242. *Perley v. Spring*, 12 *Mass. Rep.* 297. *Duval v. Trusk*, 1 *id.* 154. *Townsley v. Sumrall*, 2 *Peters*, 182. *Farley v. Cleveland*, 4 *Cowen*, 333. *Skelton v. Brewster*, 8 *J. R.* 293. *Stocking v. Sage*, 1 *Conn. Rep.* 519.

3. Will not the maxim *caveat emptor* apply in the sale of goods, if there be neither fraud nor warranty?

It will, and the purchaser can maintain no action against the vendor.—*Defreeze v. Trumper*, 1 *A.* 274. *Holden v. Daken*, 4 *J. R.* 421. *Swete v. Colgate*, 20 *J. R.* 196. *Dean v. Mason*, 4 *Conn. Rep.* 428. *Willing v. Consequa*, 1 *Peters' R.* 317. *Emerson v. Brigham*, 10 *Mass. R.* 197. *Fleming v. Sloacum*, 18 *J. R.* 403. *Walsh v. Carter*, 1 *Wend.* 185. *Wilson v. Shackelford*, 4 *Rand.* 5. *Sandes v. Taylor*, 5 *J. R.* 395. *Snell v. Moses*, 1 *J. R.* 96. *Perry v. Aeron*, 1 *A.* 128.

Where on guarantying the collection of a note, the party was to pay all costs, etc., for its recovery, it was held that the construction of the contract was, that legal remedies should be resorted to, before recourse could be had to the guarantor.—*Taylor et al. v. Bullin*.

OF THE APPLICATION OF THE *LEX LOCI* AND *LEX FORI*.

1. How is a contract to be governed if it be made under one government, and to be performed under another?

If the parties had in view the laws of such other country, in reference to the execution of the contract; the general rule is that the contract in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed.—*Hub. de conflictu legum. Sec. 10, Voet. ad pand. 4, 1, 29. Lord Mansfield in Robinson v. Bland, 2 Burr. Rep. 1077. Dig. 42, 5. Ibid, 44, 7, 21. Story's Commentaries on the Conflict of Laws, 233, 234. Prentiss v. Savage, 13 Mass. Rep. 23.* If, for instance, A in America orders goods from England, and the English merchant executes the order, the contract is governed by the law of England, for the contract is there consummated.—*Caseragis, Dis. 170. Whiston v. Stoddeo, 8 Martin's Louis. Rep. 93.*

This exception to the application of the *lex loci* is more embarrassed than any other branch of the subject by distinctions and jarring decisions. For further information on this subject I would refer the student to 2 *Kent*, 459, 460, 461, please examine notes appendant thereto; a rich store of useful information is there condensed in the small space of three pages. The writer here mentions, directing the attention of the student to the pages alluded to, presuming that there is no gentleman professing to be an American lawyer who is not (or should not be) perfectly familiar with the celebrated Commentaries of Chancellor Kent.

The place where the contract is made, or act done, commonly called the *forum rei gestæ* or *forum contractus*, not only real but mixed actions, such as trespass upon real property, are properly referrible to the *forum rei sitæ*.—*Skinner v. East India Company, cited in Cowp. Rep. 168. Doulson v. Mathews, 4 Term Rep. 503. Livingstone v. Jefferson, 4 Halls. L. J. 78. Story on the Conflict of Laws, 448, 449, 466, 467.* But the court of chancery having authority to act in *personam*, will act indirectly and under qualifications upon real estate situated in a foreign country, by reason of this authority over the person; and it will compel him to give effect to its decrees by a conveyance, release, or otherwise, respecting such property.—*Lord Hardwicke in Forster v. Vassall, 3 Atk. Rep. 589. 1 Eq. Cas. Abr. 133. C. Arglace v. Murcham, 1 Verm. Rep. 75, 135. Earl of Kildare v. Eustace, Ibid, 419. Penn v. Lord Baltimore, 1 Vessey, 144. Lord Cranston v. Johnston, 3 Vessey, 182, 183. Massie v. Watts, 6 Cranch, 148, 160.* In this last case, the court, upon the authority of the preceding cases, sustained a jurisdiction in equity, in cases of fraud, trust, and contract, whenever the person was duly within their process and jurisdiction, although lands not within the jurisdiction of the court, might be affected by the decree.—*Story on the Conflict of Laws, 454, 457. The court of chancery in New-York in Ward v. Arrodondo, 1 Hopkins' Rep. 213. Mead v. Merritt, 2 Paige's Rep. 402, and of Virginia in Farley v. Shippen, Wythe's Rep. 135, and Humphrey v. M'Clenachen, 1 Munf. Rep. 501,* have declared and enforced the same doctrine. If the court had ac-

quired jurisdiction of the person by his being within the case; they will compel him by attachment, to do his duty under his contract or trust, by executing a conveyance, or otherwise, as justice may require in respect to lands abroad.—2 *Kent*, 468, note B.

2. Is not a contract valid by the law of the place where it is made, generally speaking, valid everywhere?

It is.—2 *Kent*, 453. The *lex loci contractus* controls the nature, construction, and validity of the contract, and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to be originally established.—*Et hoc jure gentium omnes pene contractus, introducti sunt usu exigente et humanis necessitatibus*, *Inst.* 1, 2, 3. *Par-dessus*, *Droit Commercial*, tome 5, p. 1482. *Trasher v. Everhart*, 3 *Gill & Johns*. 234. *Pickering v. Fisk*, 6 *Vermont Rep.* 102. *Story's Commentaries on the Confli. of Laws*, p. 201, 202. See further on this subject, *Kent's Commentaries*, 458, Vol. 2, 3d edit. note B. & C.

3. May it not be laid down as the settled doctrine of public law, that personal contracts are to have the same validity, interpretation and obligatory force in every other country, as they have in the country where they were made?

It may.—*Bank of the United States v. Donally*, 8 *Peters' U. S. Rep.* 361. *Waiders v. Orr*, 3 *Dev. N. C. Rep.* 161. 2 *Kent*, 458, note b. If, therefore, under a foreign marriage contract, the husband would be entitled to property, accrued to the wife during coverture, the English courts will enforce it without raising an equity for a settlement in favor of the wife.—*Anstruther v. Adair*, 2 *Mylne & Keene*, 573.

Parties are presumed to contract in reference to the laws of the country in which the contract is made, and it is a maxim, that *locus contractus legit actum*, unless the intention of the parties to the contrary be clearly shown.—2 *Kent*, 458. The interpretation of the contract is to be governed by the law of the country where the contract was made, but the mode of suing and the time of suing, must be governed by the law of the country where the action is brought.—*Hub. de Conflictu Legum*, Sec. 7. *De la Vega v. Vianna*, 1 *B. & Adolph.* 284. *Trimbey v. Vignier*, 1 *Bing. N. C. Rep.* 151.

4. Is there not an exception to the rule giving universal validity to contracts?

There is; the rule that no people are bound to enforce, or hold valid in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law.—*Hub. Prælec. Jr. Civ.* tome 2, b. 1, tit. 3. *De Conflictu Legum*, *Voet ad Pand. lib.* 5, tit. 1, sec. 51. *Emerig. des Ass.* ch. 4, sec. 8, vol. 1, 122. *Kaimes' Principles of Equity*, b. 3, ch. 8, sec. 4. *Van Reimsdike v. Kane*, 1 *Gall. Rep.* 371. *Harvey v. Richards*, 1 *Mason's Rep.* 381. *Veroy v. Crowninshield*, 2 *Ibid.* 151. *Greenwood v. Curtis*, 6 *Mass. Rep.* 358. *Brown v. Richardson*, 13 *Martin's Louis. Rep.* 202.

Blanchard v. Russel, 13 *Mass. Rep.* 1. *Prentiss v. Savage*, *Ibid.* 26. *Lodge v. Phelps*, 1 *Johns. Cas.* 159. *Saul v. His Creditors*, 17 *Martin's Louis. Rep.* 569. *Story's Commentaries on the Conflicts of Law*, p. 203, 215. In this work of Mr. Justice Story, the exceptions in the text are stated and discussed, and the authorities in support of them collected. In New Jersey it was held, in *Varnum v. Camp*, 1 *Green's Rep.* 326, that an assignment of personal property by an insolvent debtor, made at New-York, in trust to pay creditors, and giving preferences, though good in New-York, was void as to personal property in New Jersey, because their statute law prohibited preferences in that case. The *lex rei sita*, even as to personal property, prevailed by force of the statute over the *lex loci*.—*Note B*, 2 *Kent*, 458.

5. Is it not a consequence of the admission of the *lex loci*, that contracts void by the law of the land where they are made, are void in every other country?

It is; so also the personal incompetency of individuals to contract, as in the case of infancy, and general capacities to contract, depend, as a general rule, upon the law of the place of the contract.—*Alves v. Hodgson*, 7 *Term. Rep.* 241. *Desebates v. Berquier*, 1 *Binney's Rep.* 336. *Houghton v. Page*, 2 *N. H. Rep.* 42. *Story's Commentaries on the Conflict of Laws*, 203. *Pickering v. Fisk*, 9 *Vermont Rep.* 102. *Male v. Roberts*, 3 *Esp. N. P. Rep.* 163. *Ex parte Lewis*, 1 *Vesey*, 297. *Henry on Foreign Law*, 96. *Saul v. His Creditors*, 17 *Martin's Louis. Rep.* 596, 598. *Story on the Conflict of Laws*, p. 97.

6. Is it not a general rule, that whatever constitutes a good defence by the law of the place where the contract is made, or is to be performed, is equally good in every other place where the question is litigated?

It is.—2 *Kent*, 459.

7. Is not the discharge of a debtor under the bankrupt or insolvent laws of the country where the contract was made, and in cases free from partiality and injustice, a good discharge in every other country, and pleadable in bar?

It is.—2 *Kent*, 459. The same law which creates the charge, is to be regarded when it operates in the discharge of the contract.—*Ballantine v. Goulding*, 1 *Cooke's B. L.* 347, 1st ed. *Potter v. Brown*, 5 *East's R.* 124. *Van Raugh v. Van Arsdale*, 3 *Caines' Rep.* 154. *Smith v. Smith*, 2 *Johns. Rep.* 225. *Hicks v. Brown*, 12 *Johns. Rep.* 142. *Blanchard v. Russel*, 13 *Mass. Rep.* 1. *Bradford v. Farrand*, *Ibid.* 13. *Prentiss v. Savage*, *Ibid.* 20. *Van Reimsdyke v. Kane*, 1 *Gall. Rep.* 471. *Leroy v. Crowninshield*, 2 *Mason's R.* 151. *Green v. Sarmiento*, 1 *Peters' C. C. Rep.* 74. *Story on the Conflict of Laws*, 272, 289. 2 *Kent's Com.* 393. All the foreign jurists agree, that every contract must conform to the formalities and solemnities required by the *lex loci* in respect to their valid execution; and the like doctrine is recognized in *Alves v. Hodgson*, 7 *Term. Rep.* 741. *Clegg v. Levy*, 3 *Camp. Rep.* 166. *Vidal v. Thompson*, 11

Martin's Louis. Rep. 23. *Depau v. Humphries*, 20 *Ibid.*, 1, 22; but a contrary rule was declared in *Winne v. Jackson*, 2 *Russel's Rep.* 351. *James v. Catherwood*, 3 *Dowl. & Ryl.* 190. Mr. Justice Story adds the weight of his opinion to the rule first mentioned.—*Commentaries on Conflict of Laws*, 215, 219.

8. Is not the *lex loci* to regulate the remedy?

It is.—*Leroy v. Crowninshield*, 2 *Mason's U. S. Rep.* 151.

SALES AT AUCTION.

1. What is the rule with regard to representation on sales at auction?

In the sale of real property at auction, care should be taken that the description of it be accurate, or the purchaser will not be held to a performance of the contract. But if the description be substantially true, and be defective or inaccurate in a slight degree only, the purchaser will be required to perform the contract, if the sale be fair and the title good.—2 *Kent*, 537, 3d ed. *Colcraft v. Roebuck*, 1 *Vesey, Jun.* 221. *Dyer v. Hargrave, Vesey*, 505. *King v. Bardeau*, 6 *Johns. Ch. Rep.* 38.

2. What is the legal effect, if the owner employ puffers to bid for him upon a sale at auction?

It has been held to be a fraud upon the real bidders; he must not enhance the price by a person privately employed by him for that purpose.

A select puffer employed by the owner is not fair bidding, and is a fraud upon the public; nor can the owner privately bid upon his own goods. All secret dealing on the part of the seller is deemed fraudulent. This was the doctrine declared by Lord Mansfield in *Bexwell v. Christie, Cowp. Rep.* 395; and again by Lord Kenyon, in *Howard v. Castle*, 6 *T. Rep.* 642, and in each case with the approbation of the court of *K. B.* The governing principle was, that the buyer should not be deceived by any secret manœuvre of the seller. But the doctrine of those cases has since been considered laid down rather too broadly. Lord Rosslyn and Sir William Grant have each questioned the soundness of the doctrine.—*Condlly v. Parsons*, 3 *Vesey*, 625, n. *Smith v. Clarke*, 12 *Vesey*, 477. It would seem to be the conclusion from the latter cases, that the employment of a bidder by the owner would or would not be fraud, according to circumstances tending to show innocence of intention or fraudulent design. If he was employed *bona fide* to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate the sale.—2 *Kent*, 538.

The original doctrine of the *K. B.* is the more just and salutary doctrine; in sound policy, no person ought, in any case, to be employed secretly to bid for the owner against the *bona fide* bidder at a public auction; and such a doctrine has been recently declared at Westminster Hall.—*Crowder v. Austin*, 3 *Bing. Rem.* 368. 2 *Kent*, 539.

3. How far are auction sales considered to be within the statute of frauds?

It is now understood to be settled, that the auctioneer is the agent of both parties, and lawfully authorized by the purchaser, either of land or goods, to sign the contract of sale for him as the highest bidder. The writing his name as the highest bidder in a *memorandum* of the sale by the auctioneer, immediately on receiving his bid, and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds, so as to bind the purchaser.—2 *Kent*, 539.

CONTRACTS AFFECTED BY THE STATUTE OF FRAUDS.

1. Is a contract for a sale of goods, hereafter to be manufactured, considered to come within the statute of frauds?

It was held in the case of *Towers v. Osbourne*, *Str. Rep.* 506, and *Clayton v. Andrews*, 4 *Burr. Rep.* 2107, that such contracts were not within the statute of frauds, which only related to sales where the delivery was to be immediate, and the buyer immediately answerable. In the one case, the coach was to be afterwards made, and the other, the wheat was to be threshed, and as the article contracted to be sold was to be first manufactured, or labor bestowed upon it, the contract might be deemed to be one for work and labor in making or preparing an article for delivery. These cases have been since somewhat questioned, and the latter went quite far with its distinction. It seems now to be settled, that the statute of frauds extends to executory as well as to executed contracts; and that if the article sold existed at the time in *solido*, and was capable of delivery, the contract is within the statute of frauds; but if the article is to be afterwards manufactured, or prepared by work and labor for delivery, the contract is not within the statute.—*Rondeau v. Wyatt*, 2 *H. Black's Rep.* 63. *Cooper v. Elstan*, 7 *Term Rep.* 14. *Bennett v. Hull*, 10 *Johns. Rep.* 364. *Sewell v. Fitch*, 8 *Cowen's Rep.* 215.

2. Is not the signing of an agreement by one party sufficient?

It is, provided it be the party sought to be charged.—*Douglas v. Spears*, 2 *Nott & M'Cord*, 207. *Barstow v. Gray*, 3 *Greenleaf*, 409. *Bulard v. Walker*, 3 *Johns. Cas.* 60. *Classon v. Bailey*, 14 *Johns.* 487.

3. Are not the situation and true intent of all parties on the subject matter, to be considered in determining the meaning of a contract?

They are.—*Howland v. Leach*, 11 *Pick.* 154. *Wilson v. Troup*, 2 *Cowen*, 195. *Summer v. Williams*, 8 *Mass.* 214. *Fowle v. Bigelow*, 10 *Mass.* 379. *Hopkins v. Young*, 11 *Mass.* 302.

4. If to pay the debt of another in consideration of forbearance, need it be in writing?

It need not.—*Ullen v. Kittredge*, 7 *Mass. Rep.* 233. *Sears v. Brink*, 3 *Johns. Rep.* 210. *Leonard v. Vredenburg*, 8 *Johns. Rep.* 29. *Packard v. Richardson*, 17 *Mass. Rep.* 122. *King v. Upton*, 4 *Greenlf. Rep.* 387. *Cleaton v. Chambless*, 6 *Rand.* 86.

5. Is not a prejudice to a party to whom the promise is made a sufficient consideration?

It is.—*Summer v. Williams*, 8 *Mass. Rep.* 200. *Overstreet v. Philips* *Little's Ky. Rep.* 123. *Violett v. Patton*, 5 *Cranch's Rep.* 152.

Mr. Justice Story's remarks in *Townsley v. Sumral*, 2 *Peters' Rep.* 182. *Price v. Winston*, 1 *Munf. R.* 63. *Stocking v. Stage*, 1 *Conn. Rep.* 519. *Banks v. Mays*, 3 *Marsh. Rep.* 435.

6. Is a mere moral obligation available as a consideration for an express promise?

It is not; it is only effectual in those cases where there was a previous legal obligation.—*Edward & Wife v. Davis*, 16 *Johns. Rep.* 281, 282. n. *Early v. Mahon*, 19 *Johns. Rep.* 147. *Kilbourne v. Bradley*, 3 *Day's R.* 356. *Cook v. Bradley*, 7 *Conn. Rep.* 57. *Smith v. Ware*, 13 *Johns. N. Y. Rep.* 257. *Mills v. Wyman*, 3 *Pickg. Mass. Rep.* 207.

7. Is not a memorandum signed by the vendor only, and accepted by the purchaser, mutually obligatory for the sale and delivery of goods, on the contract?

It is.—*Roget v. Merritt*, 2 *Caines*, 117, 120. *Douglass v. Spears*, 2 *Nott & M'Cord*, 207. *Penniman v. Hartshorn*, 13 *Mass. Rep.* 87.

8. Is a contract to sell the improvements made on land within the statute of frauds?

It is not; improvements on land, is only another name for work and labor bestowed on land: and a parol promise to pay for such services has never been held to be within the statute.—*Lower v. Winters*, 7 *Cowen*, 263. See *Frear v. Hardenberg*, 5 *J. R.* 275. Per *Spencer, J.*, and note (a.) 277. *Benedict v. Beebe*, 11 *J. R.* 145. *Crookshank v. Burrel*, 18 *J. R.* 58.

CONTRACTS AFFECTED BY USURY.

1. What is necessary to constitute usury?

That there must either be an existing debt or a direct loan, and an agreement to pay more than the legal interest for the forbearance of the debt or loan, or some device contrived for the purpose of evading or concealing the appearance of a loan and forbearance, when in truth it was such.—*Chitty on Contracts*, 541.

• That wherever the consideration which is the ground of the promise, or the promise which is the consequence or the effect of the consideration, be unlawful, the whole contract is void.—1 *Bulls.* 38. 2 *Porters' S. C. Rep.* 541.

A profit made or loss imposed, on the necessities of the borrower; whatever form, shape, or disguise it may assume where the treaty is for a loan, and the capital is to be returned at all events; has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest.

To constitute usury within the prohibitions of the law, there must be an intention knowingly to contract for, and take, usurious interest; for if neither party intend it, and act *bona fide* and innocently, the law will not infer a corrupt agreement.—*Bank of the United States v. Waggoner et al.* 9 *Peters*, 378.

2. Is a loan of stock within the statute of usury?

It is; yet loan of money produced by the sale of stock, on an agreement that the borrower shall replace that stock on a certain day, or repay the money on a subsequent day, with such interest in the mean time as the stock itself would have produced, is not usurious. It is not illegal to reserve the dividends, by way of interest, for stock lent, although this may amount to more than five *per cent.* on the produce of it.—*Tate v. Willings*, 3 *T. R.* 531. *Maddock v. Rumball*, 8 *East*, 304. *Bolden v. Jackson*, 11 *ib.* 612. See *Cooke on Mortgages*, 307, 308. 7 *Johns.* 196. 5 *Esp.* 164. *Setby v. Morgan*, 3 *Leigh*, 577. *White v. Wright*, 3 *B. & C.* 273. 5 *Dowl. & Ryl.* 110. *S. C.*

3. What is the rule as to the time when an agreement for interest is made, in order to bring it within the statute?

It is a clear principle, that to defeat a debt or agreement on the ground of usury, the contract must have been usurious at the time the debt or demand was created thereby; for if a demand do not originate in, or accrue from, an usurious bargain, no subsequent reservation of illegal interest, or posterior arrangement for an usurious security, will taint or invalidate the original claim, although the penalty will be incurred by taking usurious interest on such agreement.—*Tate v. Willings*, 3 *T. R.* 539. 1 *Saund.* 295, n. 1. *Parr v. Eliason*, 1 *Eust.* 92. *Phillips v. Cockane*, 3 *Camp.* 119. *Parker v. Ramshotton*, 3 *B. & C.* 257, 270. 5 *D. & R.* 138, 151. 8 *Mass.* 101, 256.

4. What is the rule as to a substituted agreement or new security?

That if usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest, is founded on a sufficient consideration, and is binding.—*Barnes v. Hedley*, 2 *Taunt.* 184, 41. *Kilbourne v. Bradley*, 3 *Day*, 356. *Batsford v. Stanford*, 2 *Conn.* 276.

And the substitution of a bond, securing the principal on which legal

interest was made payable is valid.—*Wright v. Wheeler, Peak. Add. C. 175.* 1 *Camp.* 165, note *S. C.* see 3, *ib. Hamp.* 185.

5. What if a mortgage be taken on a loan of money, including a former usurious loan?

It is void, and the taint of usury destroys the whole security.—*Jackson v. Packard, 6 Wendell, 415.*

6. How is a *bona fide* holder of a bill or note affected by an original usurious consideration?

He is not thereby affected, if he be an endorsee for a valuable consideration; unless he had at the time of discounting or paying such consideration for the same, actual notice that such a bill or note had been originally tainted with usury. It has been held, that the holder of a bill suing thereon, must prove that he holds it for value, after the defendant has shown that there was usury between prior parties to the instrument; although no notice to dispute the consideration has been given.—*Wyatt v. Campbell, Moo. & M. 80.*

7. What is the rule where a separate security is taken for the usurious interest?

That if a contract for the loan of money be void on the ground of usury, a separate security for the principal or interest only cannot be enforced.—*Fountain v. Grymes, Cro. Jac. 252, 508.* It is not material that the usurious contract is to be executed, and is evidenced by means of two separate instruments, instead of being comprised in one.—*White v. Wright, 3 B. & C. 273.* 5 *D. & R. 110.* *S. C. 11 Mass. 74.* *Hammond v. Hoppin, 13 Wend. 505.* It is usurious for the discountor of a bill to engage with the holder, that he shall pay to the agent procuring the discount a premium, though he himself retain only the legal discount.—*Meagoe v. Simmons, 1 Moody & Malkin, 121.*

8. What is the rule as to the discountor or purchaser's right to charge an additional premium to cover expenses?

That he may lawfully charge and take a reasonable commission or remuneration, besides legal interest, for his *bona fide* and necessary expense and trouble.—*Palmer v. Baker, 1 M. & Sel. 56.* But if a loan be mixed up with the transactions, and the compensation demanded be unreasonable, it is a question for the jury, whether the commission be a shift to obtain more than legal interest for the forbearance.—*Masterman v. Cowries, 3 Camp. 482.* *Lee v. Cass, 1 Taunt. 511.*

9. What is the rule where goods are taken on the discount of a bill?

That when goods are taken in part of money agreed to be advanced as a loan, the presumption of law appears to be, that no usury was contemplated, and consequently the lender is not to be called upon to show the

real value of the goods. But if it appear that the borrower was *compelled* by the lender to take goods instead of cash, as part of the loan, a suspicion arises that usurious interest was agreed for, and the lender must obviate this suspicion, by showing that the goods were fairly and substantially worth the sum charged.—*Train v. Collins*, 2 *Pick.* 145. *Davis v. Hardacre*, 2 *Camp.* 375, 553. *Pratt v. Wiley*, 1 *Esp.* 40.

10. What if a bank, on discounting a bill, reserve full legal interest, and pay out its own paper, which is itself at a discount in the market?

Such a contract is usurious. C. & Co. discounted their notes with the F. and M. Bank of Georgetown, at thirty days; and in lieu of money, they stipulated to take the post notes of the bank, payable at a future day, without interest, while the post notes were at a discount of one and a half per cent. in the market at the time of the transaction. Held usurious.—*Garther v. The Farmers' & Mechanics' Bank of Georgetown*, 1 *Peters' S. C. Rep.* 43. The endorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the endorsement is void; and passes no property to the bank, in the note; and the subsequent payment of the original note, for which the security was given, and the re-payment of the sum received as usury, will not give legality to the transaction.—*Ibid.*

If a note be free from usury in its origin, no subsequent usurious transaction respecting it, can affect it with the taint of usury, although an endorser of the note, whose property in it was acquired though an usurious transaction, may not be able to maintain a suit upon it.—*Ibid.*, 43.

11. In construing the statute of usury, what is the distinction taken between reserving and taking illegal interest?

It is this; the reservation of usurious interest makes the contract utterly void: but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, but the party is only liable to the penalty for the excess. It was so held in *Floyer v. Edwards*, *Cowp. Rep.* 112. *Bank of the United States v. Waggoner and others*, 9 *Peters' S. C. Rep.* 399.

12. How will a note, endorsed for the accommodation of the maker, and passed by him as a security for an usurious loan, be held?

It will be held as an usurious contract, in its inception, as the lender is in fact to be considered as the first holder of the note. *Saurwein v. Brunner*, 1 *Har. & Gill.* 477.

B through an agent applied to T to borrow a sum of money at an interest of *fifteen per centum per annum*, to be secured by mortgage on a house and lot. T replied, he was willing to advance the money, but would have nothing to do with the mortgage, but that he would purchase the property for the sum required, and would rent it to B for a rent equivalent to an interest of *fifteen per centum per annum*, with privilege to B to redeem the property for the sum advanced, on paying up the rent.

These terms were acceded to by B, who executed a deed to T, and received from him a lease, reserving a rent equal to *fifteen per centum per annum*, on the sum advanced, payable quarterly, with a stipulation by T to re-convey the property at any time within five years, on payment by B of the sum advanced, with all arrearages of rent then due. Held, that on a question of usury, it is the intention of the parties, which gives character to the transaction, and no matter what the form, where the real truth and substance is a loan of money, at more than an interest of *six per centum per annum*, no shift or device can take it out of the act of assembly against usury.—*Tyson v. Rickard*, 3 Har. & Johns. 109.

13. Is a stipulation to pay the principal necessary to constitute a loan?

It is not; it is enough if the principal is secured, and not *bona fide* put in hazard; and it matters not what the nature of the security is, if it be sufficient. If the principal be secured, and the interest reserved is more than the law allows, it is usury.—*Tyson v. Rickard*, 3 Har. & J. 109. The seven and a half per cent. imposed by the society to indemnify them for the expenses incurred in the employment of collectors, is not usury, nor is the nature of the penalty, but stipulated damages.—*Stratton v. Mutual Assurance Company*, 6 Randolph, 22.

14. What is the proper remedy to recover money paid upon an usurious contract?

An action of assumpsit for money had and received, or an action *quittam*.—*Smith v. Bromley*, Cases in term of Ld. H. K. 38. *Bosanquet v. Dashwood*, 1 Pow. C. 204, 5. 11 Mass. Rep. 376. 12 Ibid. 1 Salk. 32, *Tomkins v. Barrett*.

15. By whom is it to be decided whether a contract is usurious or not?

Whether in point of fact usury was committed or not, is a question for the jury upon the whole of the evidence submitted to them: but where the facts are agreed or found by the jury, it is the province of the court to say, whether they amount to usury or not.—*Stribbling v. the Bank of the Valley*, 5 Rand. 132. The court have the exclusive power of deciding whether a written contract be usurious.—*Lewyer v. Gadsby*, 3 Cranch, 180.

16. Upon what conditions will equity relieve against usury?

It never relieves against an usurious security, on the application of the person who executed it; except upon the terms of his paying what is really *bona fide* due thereon with legal interest.—*Scott v. Nesbitt*, 2 Br. C. C. 641, 9 Ves. 84. 16 Ibid. 124. The rules of the court in relation to practice, are never dispensed with to enable a defendant to defend on the ground of usury: except on his consenting to a decree for the amount actually received with the interest.—*Morgan v. Schermerhorn*, 1 Paige's N. Y. Ch. Rep. 544.

17. What is the general rule as to the admission of a party to a negotiable note, as a witness to prove it usurious?

The general rule established by the American cases, appears to be, that a party to a negotiable note shall not be admitted as a witness to prove it usurious. This rule was first introduced in England, in 1796, in the case of *Walton v. Shelly*, 1 T. B. 296. In 1798, the rule which, notwithstanding that case, had never been firmly established in England, was abandoned.—*Jordaine v. Lashbrook*, 7 J. R. 601, and it has ever since been held in that country, that a party to a negotiable instrument, if not interested, may be a witness to impeach its validity. Some exceptions to the rule have been made by decisions in some of the states. The exceptions are not all of them established in all the states in which the rule is admitted. One of these is, that where the plaintiff is himself a party to the illegal concoction of the note; a party to the note, if not interested, may prove that it was void in its original formation.—See *Powell v. Waters*, 17 Johns. 176, S. C. in the Court of Errors. 8 Cowen, 669. *Myers v. Palmer*, 18 Johns. 167. *Tutill v. Davis*, 20 Johns. New York and Massachusetts have not always recognized this exception.—See *Mann v. Swan*, 14 Johns. 270. *Manning v. Wheatland*, 10 Mass. 502. *Churchill v. Suiter*, 4 Mass. 156. In the recent case of *Chandler v. Morton*, 5 Greenleaf, 374, in the Supreme Court of Maine, it was adjudged that the rule, that a party to a negotiable note shall not be admitted as a witness to prove it usurious, extend to the maker of an accommodation note.

18. What is it necessary to set out in a plea of usury?

It is not necessary to set out the corrupt agreement particularly, but it must be alleged that the excess was reserved, or received under a corrupt agreement, in order to bring the case within the statute.—3 N. Hamp. Rep. 116. *Copeland v. Jones*. It must also state the amount of unlawful interest reserved or taken, and enough must be stated in the plea to enable the court to find what sum is unlawfully due on the contract sued.—*Olcott v. Alden*, 6 N. Hamp. Rep. 517.

Usury may in some cases be given in evidence under the general issue.—*Cotton v. Lake*, 2 Mass. 540. But if an action brought on a specialty, the defendant would avoid the contract on the ground of usury, he must set forth the matter in a special plea.—*Hills v. Elliott*, 10 Mass. Rep. 26. And the same principle prevails in Great Britain. The rule there is that in debt on a specialty, usury must be pleaded, but in assumpsit or in debt on a simple contract, it may be given in evidence under the general issue.—*Hill v. Montague*, 2 M. & S. 377. *Nicholl v. Lee*, 3 Aust., p. 940.

19. How do the statutes of usury apply to contracts, reserving interest made in one place, to be executed in another?

Such contracts are to be governed by the laws of the place of performance; and if the interest allowed by the laws of the place of performance be greater than that permitted at the place of the contract, the parties may stipulate for the higher interest, without incurring the penalty of usury.—*Andrews v. Pond et al.*, 13 Peters' S. C. Rep. 65.

It is a principle recognized and acted upon as a cardinal rule by all courts of justice, in the construction of contracts, that the intention of the parties is to be inquired into, and if not forbidden by law, is to be effectuated.—*Bradley v. The Washington, Alexandria, and Georgetown Steam Packet Company*, 97.

OF CONTRACTS, ILLEGAL, AFFECTED BY FRAUD, AND CONTRARY TO GOOD MORALS.

1. Is one of several partners in an illegal contract, entitled to the assistance of a court of justice, to compel an account of profits or loss, growing out of the transaction?

He is not.—*Bartle v. Coleman*, 4 *Peters' S. C. Rep.* 184.

A contract was made for rebuilding Fort Washington, by M, a public agent, and a deputy quarter-master general, with B, in the profits of which M was to participate. False measures of the work were attempted to be imposed upon the government, the success of which was prevented by the vigilance of the accounting officers of the treasury. A bill was filed to compel an alleged partner in the contract, to account for, and pay to one of the partners in the transaction, one half of the loss sustained in the execution of the contract. Held that to state such a case is to decide it; public morals, public justice, and the well established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which began with the corruption of a public officer, and progressed in the practice of known wilful deception in its execution, can never be approved or sanctioned by any court.—4 *Ibid.*, 184. The law leaves the parties to such a contract as it found them; if either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers to shift the loss from one to the other, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals or law.—*Ibid.*

2. Is a device to cover property as neutral, when in truth it is belligerent, contrary to the laws of war or of nations?

It is not; contracts made with underwriters in relation to property thus covered, have always been enforced in the courts of a neutral country, where the true character of property, and the means taken to protect it from capture, have been fairly represented to the insurers.

Courts of the capturing nation would never enforce contracts of that description, but they have always been regarded as lawful in the courts of a neutral country.—*De Valengius's Administrators v. Duffy*, 14 *Peters' Rep.* 282.

3. Is a contract growing out of an immoral act void?

It is, or if in restraint of trade.—*Armstrong v. Toler*, 11 *Wheat. N. S. Rep.* p. 258. *Pierre v. Fuller*, 8 *Mass. Rep.* 243; *Pyke v. Thomas*, 4 *Bibb's Rep.* 486. *Williams v. Gilman*, 3 *Greenleaf's Me. Rep.* 276. *Noble v. Bates*, 7 *Cowen's N. Y. Rep.* 307.

4. Will equity as well as law prevent the effects of illegal contracts ?

It will.—*Wilson v. Spencer*, 1 *Randolph's Va. Rep.* 76.

5. Is not an executed contract, though founded on an immoral consideration, valid ?

It is.—*Denton & Wife v. English*, 2 *Nott & M'Cord's Rep.* 581. *Winnelrinner v. Weysiger*, 3 *Monroe's Ky. Rep.* 35. *Jones v. Jones*, 2 *Taylor's Rep.* 110. *Stowell v. Guthrie*, 2 *Hayw. N. Ca. Rep.* 297.

6. Is not an illegal contract made between parties who are in *pari delicto* to the contract void ?

It is, and neither party can maintain an action.—*Springfield Bank v. Merrick*, 14 *Mass. Rep.* 322. *Wheeler v. Russel*, 17 *Mass. Rep.* 258. 5 *Johns. N. Y. Rep.*, *Hunt v. Knickerbocker*.

And so is a contract of insurance made in opposition to the maritime laws.—*Craig v. The United In. Co.*, C. C. U. S. Penn. *Coulon v. Anthony*, 4 *Yeates' Rep.* 24. *Patton v. Nicholson*, 3 *Wheat.* 204.

7. What is the maxim of the common law in regard to contracts for the performance of immoral acts, or based upon immoral considerations ?

That *ex turpi contractu oritur non actio*. The common law prohibits every thing which is unjust, or *contra bonos mores*.—*Allen v. Roscous*, 2 *Lev.* 174. *Fletcher v. Hercot*, *Hutton*, 56. *Holmon v. Johnson*, *Cowper*, 343: and the test whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case.—*Simpson v. Bloss*, 7 *Taunt.* 246. 2 *Marsh*, 542, S. C. *Callagher v. Hallet*, 1 *Caines*, 104. *Foresythe v. State*, 6 *Ohio*, 21, *Per Duncan, J.* *Swan v. Scott*, 11 *Serg. & Rawle*, 164.

8. How will a bond or deed given by a man to a woman living in adultery with him at the time, be held ?

It will be held good at law, if the deed does not express the consideration for which it was given, and purports to be for a good and valuable consideration.—*Cusack v. White*, 2 *Rep. Con. Ct.* 284, 285. A contract made in consideration of future cohabitation, is absolutely void, yet a bond or deed for past cohabitation is good.

9. How are marriage brokerage contracts held ?

A marriage brokerage contract, that is, an undertaking to procure a marriage between two parties, for a reward, is void.—*Hall v. Potter*, 3 *Lev.*

411. *Kent v. Allen*, 2 *Vermont Rep.* 588. *Roberts v. Roberts*, 3 *P. Williams*, 75, note 1.

A sealed bill promising to pay a sum of money, provided the obligee is not lawfully married within six months from the date, is illegal and void.—*Sterling v. Sinickson*, 2 *Southard*, 756.

10. How are contracts for the sale of offices held ?

They may often be void, though not in the particular case prohibited by statute, as being contrary to public policy. No action will lie on any contract, bond, or agreement for the sale of the deputation of any office relating to the administration of justice.—*Outen v. Rhodes*, 3 *Marsh.* 433.

An action cannot be maintained upon a note, given by a candidate to a person, in consideration of his agreeing to give to the candidate his interest at the ensuing election.—*Swayze v. Hull*, 3 *Halst.* 54.

11. Does the misrepresentation of the legal effect of an agreement constitute a fraud ?

It does not. But fraud clearly occurs where one person substantially misrepresents, or conceals a material fact, peculiarly within his own knowledge. Thus, the plaintiff being about to furnish the defendant's son with goods on credit, inquired of the defendant, by letter, whether his son had (as he asserted) a certain capital, his own property ; the defendant replied that the assertion was true, as he had advanced such capital to his son. The fact was, the defendant had merely lent his son the money on his note, payable with interest on demand. The son having afterwards become insolvent, it was held that this was a misrepresentation, for which the defendant was liable in damages.—*Corbet v. Brown*, 8 *Bing.* 33. *Colhill v. Water*, 3 *Barn. & Adolph.* 114. Which was the case of an implied or virtual misrepresentation by the defendant, without any fraudulent intent, but which was held to be a fraud in law. In the case of *Allen v. Addington*, 7 *Wendell*, 9, it was held that the false representation may consist in the *suppression* of the truth, as well as the assertion of a falsehood, if the intent to deceive exists, and is the cause of such suppression ; it is not necessary to the maintenance of the action, that the person deceiving should be benefited by the fraud, nor that the intention should exist to defraud the plaintiff in *particular* ; if a person intending to defraud somebody, give a *general recommendation* of credit to an insolvent person, any one who sustains damage by reason of such recommendation, is entitled to an action for such damage, grounded upon the fraud. That a person making a fraudulent representation is liable to an action, although other recommendations were given by others, which had an influence on the mind of the party injured, if the recommendation complained of as fraudulent, was that which procured the credit. That a *false representation* with a *fraudulent intent* is enough to sustain the action, where it appears that the party injured relied on the representation, and was deceived by it ; and it is not necessary to show that a deceit was practised to throw the party off his guard. That, where goods are obtained by a *fraudulent representation*, and an action is brought for the injury, the jury are authorized to

give damages for the punishment of the fraud over and above the value of the goods.

12. Is not a contract to indemnify an officer for neglecting his duty in the service of process, void ?

It is, and no action can be sustained upon it.—*Hodgson v. Wilkins*, 7 *Green's Me. Rep.* 113. *Lauches v. Davenport*, 6 *Mass. Rep.* 261. *Pierce v. Chase*, 8 *Mass. Rep.* 487. *Ayer v. Hutchins*, 4 *Mass. Rep.* 370. *Denney v. Linchon, Adms.*, 5 *Mass. Rep.* 386. *Churchill v. Parkins*, 4 *Mass. Rep.* 381. And permitting a prisoner to go at large under such a contract amounts to a voluntary escape.—*Wheeler v. Baily*, 13 *Johns. N. Y. Rep.* 366.

13. Is not a contract to assist a candidate to procure an office at election, void ?

Yes.—*Swayze v. Hull*, 3 *Halst. N. J. Rep.* 55.

14. Is not a contract for the sale of lottery tickets not authorized by law, void ?

It is, and no action can be sustained under a contract, made in violation of the statute to punish champerty and maintenance.—*Mount v. Wardell*, 7 *Johns. Rep.* 434. *Hunt v. Knickerbocker*, 5 *Johns. Rep.* 327. *Clarke v. Havens*, 1 *Marsh.* 198. *Morton v. Fletcher*, 1 *Marsh.* 139. *Primmer v. McConnel*, 6 *Binn. Rep.* 329 (cited). *Barton v. Hughes*, 2 *Brown*, 48. *Biddis v. James*, 6 *Binn. Rep.* 321. *Best, Assignee of Plattner v. Strong*, 2 *Wend. N. Y. Rep.* 319.

15. Is not a contract in contravention of a penal statute, void ?

Yes, even where the statute contains no express prohibition of the attempt to contravene it.—*Seidenbender v. Charles*, 4 *Serg. & Rawle's Rep.* 156. *Biddis v. James*, 6 *Binn. Rep.* 321. *Barton v. Hughes*, 2 *Brown*, 48. *Wilson v. Spencer*, 1 *Rand.* 76. *Tuxberry v. Miller*, 19 *Johns. Rep.* 311. *Sharpe et al. v. Tease*, 4 *Halst. N. J. Rep.* 352. *Myers v. State of Connecticut*, 1 *Conn. Rep.* 502. *Waite v. Harper*, 2 *Johns. N. Y. Rep.* 386. *Wiggins v. Bush*, 12 *Johns. Rep.* 306.

16. Is not the promise void, where one request to direct another to do an act, which is known to be a trespass, and promise to indemnify him ?

It is ; but if the party who does the act at the instance or command of another, does not know at the time, that the act is unlawful, the promise of indemnity is valid.—*Allaire v. Ouland*, 2 *J. C.* 52. *Coventry v. Barton*, 17 *J. R.* 142.

17. Is not all trading intercourse and negotiation with an enemy's country without the direct permission of government, unlawful ?

It is.—*Griswold v. Waddington in Error*, 16 *J. R.* 438. *Leaman v.*

Waddington, 1 *ib.* 510. *Amory v. M'Gregor*, 15 *J. R.* 24. A contract, the object of which is the ransom of a vessel captured by an enemy, is almost the only exception to this general rule; and this is a thing of necessity arising out of the laws of war.—*Goodrich v. Gordon*, 15 *J. R.* 6. *Griswold v. Waddington*, 16 *J. R.* 451, 456. *Per Kent, Chancellor.*

18. Can one citizen of the United States lawfully purchase of, or sell to another citizen a license or pass, from a public enemy, to guard an American vessel against capture?

He cannot.—*Patton v. Nicholson*, 3 *Wheat.* 204, *n.* (a.) 207, *et seq.* See *contra*, *Coolidge v. Inglee*, 13 *Mass. Rep.* 26.

19. Is not a wager on the event of an election of the chief magistrate of a state unlawful, as being against public policy?

It is.—*Bunn v. Riker*, 4 *J. R.* 426. *Yeates v. Foot in Error*, 12 *Ib.* 1. *Vischer v. Yeates*, 11 *Ib.* 23. *Denniston v. Cook*, 12 *Ib.* 376. *Smith v. M'Master*, 2 *Browne*, 182.

20. Are not wagers fairly won recoverable?

They are, unless founded on a transaction which is immoral, illegal, or indecent.—*Morgan v. Richards*, 1 *Brown*, 171. *Campbell v. Richardson*, 10 *J. R.* 406.

21. Is not a promise by the defendant to pay the plaintiff a sum of money, in consideration that the plaintiff would not oppose his discharge under the insolvent act, illegal and void?

It is.—*Waite v. Harper*, 2 *J. R.* 386. *Wiggen v. Bush*, 12 *Ib.* 306. *Tuxberry v. Miller*, 19 *Ib.* 311. *Bruce v. Lee*, 4 *Ib.* 410.

22. If a third person give his note for a part of the debt due to a creditor, to induce him to sign the insolvent's petition, is not such note void?

It is, it being against the policy, and in fraud of the insolvent law.—*Yeomans v. Chatterton*, 9 *J. R.* 295.

23. Is not an agreement to conceal or stifle the prosecution of felony, illegal and void?

Yes; and all contracts relating to the sale of an office are void.—*Banks v. Mays*, 3 *Marshall's Rep.* 435. *Tuolo v. Cassion*, 1 *Nott & M'Cord*, 174. *Roll v. Raguet*, *Ohio Cond. Rep.* 843. 4 *Hammond's R.* 400. *Executors of Cambissio v. Assignees of Meffit*, 2 *Wash. U. S. Rep.* 98. *Bell v. Wood's Admrs.*, 1 *Bay*, 249.

24. Are not contracts void, if they are repugnant to the welfare of the state?

They are.—*Cusack v. White*, 2 *Consr. Rep. S. C.* 284. *Mitchell v*

Smith, 4 *Yeates' Penn. Rep.* 84. 4 *Dallas' Rep.* 369. 1 *Binney*, 110. *Crague et al. v. State of Missouri*, 4 *Peters' R.* 431. *Pingrey v. Washbourne*, 1 *Aik.* 264. *McDermot v. Castlane*, *Hard.* 18. 1 *Powell on Cont.* 174. 1 *Fonbl. Eq.* 253, 254.

But not when the contract is for the benefit and has been ratified by the government.—*Brown et al. v. Anderson*, 1 *Monroe's Ky. Rep.* 199.

25. If the contract be entered into by means of violence offered to the will, or under the influence of undue constraint, may not the party avoid it by the plea of duress?

He may; and it is requisite to the validity of every agreement, that it be the result of a free and *bona fide* exercise of the will. If a person be under an arrest for an improper purpose without a just cause, or where there is an arrest for a just cause, but without lawful authority, he may be considered as under duress.—2 *Kent*, 453.

26. What is the general rule on this subject?

The general rule is, that either the imprisonment or the duress must be tortious and unlawful, by an abuse of the lawful authority to arrest, to constitute duress by imprisonment.—*Watkins v. Baird*, 6 *Mass. Rep.* 511. *Stouffir v. Latshaw*, 2 *Watts' Penn. Reports*, 156. *Richardson v. Duncan*, 3 *N. H. Rep.* 508. This last case states that even an arrest for a just cause, and under lawful authority, may amount to duress, if done for unlawful purposes.

27. Will a judgment had against the vendor, render a contract for the sale of goods void, as being impregnated with fraud?

That fact will not of itself affect the validity of the sale of personal property, though there be a judgment against the vendor, and the purchaser has notice of it. But if the purchaser, knowing of the judgment, purchase with a view and purpose to defeat the creditor's execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor; the question of fraud depends upon the motive.—2 *Kent*, 513. *Cowp. Rep.* 434. *Dallas, Ch. J.*, 8 *Taunt. Rep.* 678. *Beals v. Guernsey*, 8 *Johns. Rep.* 446. *Duncan, J.*, 7 *Serg. & Rawle*, 89.

28. What is the rule, where the vendee is insolvent at the time of purchase, and knows himself to be incapable of making payment?

It has been decided, in the case of *Cross v. Peters*, 1 *Greenleaf's Rep.* 376, that the mere insolvency of the vendee, and the liability of the goods to immediate attachment by his creditors, though well known to himself and not disclosed to the vendor, would not of itself avoid the sale in that case; there was no false assertion, or fraudulent misrepresentation, or deceit, practised.

The validity of the sale will depend upon the discussion of the question whether there was fraud in fact.—2 *Kent*, 514. *Lupin v. Maire*, 6

Wend. Rep. 77. *Lloyd v. Brewster*, 4 *Paige's Ch. Rep.* 537. In the jurisprudence of some parts of continental Europe, it is admitted that there exists a presumption *juris et de jure* of fraud, if the buyer becomes insolvent within a few days (and which in some cases has been fixed at three) after receiving the goods.—*Voet Com. ad Pand.* 6, 1, 14, cites several authorities in support of this rule.

29. What is the legal consequence and effect of an agreement between the parties, at the time of sale, that possession was not to follow the bill of sale of goods?

There is no doubt of its being evidence of fraud; but the general point has been, whether the fraud which was to be inferred in such a case was an inference of law to be drawn by the court, and resulting inevitably from the fact, or whether the fact was only evidence of fraud to be drawn by the jury, and susceptible of explanation.

For a comprehensive analysis of the leading decisions on this point, I refer the reader to 2 *Kent's Com.*, *Lect.* xxxix, p. 515, 532, and to *Story's Com. on Equity Jurisprudence*, 261. Those learned commentators have examined the numerous cases, both English and American, with as much brevity as perspicuity will admit.

30. What is understood by *constructive* frauds?

Such contracts or acts, as though not originating in any actual evil design or contrivance, to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate public or private confidence, or to impair or injure the public interest, deemed equally reprehensible with positive fraud; and therefore are prohibited by law, as within the same reason and mischief as contracts and acts done *malo animo*.—*Story's Com. on Equity Jurisprudence*, 261.

31. Is not a contract by an attorney with his client to receive part of the property recovered, as a compensation for his services, void?

It is.—*Key v. Vatiens*, *Ohio Cond. Rep.* 65.

OF RESCINDING OF CONTRACTS.

1. What imbecility of mind will warrant the court to rescind the contract?

If advantage be taken of his weakness to draw a contract from him unfavorable by misrepresentations, impositions, or undue influence, such contract cannot be upheld.—*Farnham v. Brooks*, 9 *Pick. Mass. Reports*, 220.

2. What would the court order, on rescinding a contract?

A just compensation to the injured party.—*Jones v. Hubbard's Rep.*

representatives, 6 *Munf. Va. Rep.* 261. This rule of rescinding contracts of land, applies to contracts for land in a settled country.—*Dunlap et al. v. Dunlap et al.* 12 *Wheat. U. S. Rep.* 474. This rule does not apply to contracts of hazard.—*Fleet v. Hawkins*, 6 *Munf. Va. Rep.* 188.

3. Can a contract be rescinded in part?

It cannot.—*Raymond v. Bernard*, 12 *Johns. N. Y. Rep.* 274.

4. Must not an agreement to rescind be complied with by both parties to be effectual?

It must.—*Miller v. Smith*, 1 *Mason's U. S. Rep.* 437. *Sullivan v. Mass. Mutual Fire Ins. Co.* 2 *Mass. Rep.* 326.

5. May a sovereign state—a party to a contract—pronounce its deed invalid?

It may not.—6 *Cranch's Rep.* 87.—The correctness of the principle that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature, so far as it respects general legislation, cannot be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties upon the person, or may inflict pecuniary penalties, which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment.

When a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.

A law, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States.—2 *Condensed Rep.* 308.

6. Does not war dissolve contracts between belligerent nations?

It does.—*Jones v. Loston*, 2 *M' Cord's S. C. Rep.* 26. *S. C.* 1 *Nott & M' Cord's Rep.* 570. 1 *Dall.* 142.

7. Do threats of legal process destroy contracts?

They do not.—*Bradford's Heirs v. Brown*, 11 *Martin's Louis. Rep.* 217.

8. Will not duress of goods, in some cases, avoid a contract?

It will.—*Asportass v. Jennings*, 1 *Bay's S. C. Rep.* 470. *Collins v. Westbury et al.* 2 *Bay's Rep.* 210.

Misrepresentations will have the same effect.—*Cochrane v. Cummings*, 4 Dall. 250. *Duncan v. McCullagh*, 4 S. & R. 483. *Lessee of Eschanberger et al. v. Barnett et al.* 1 Yates' Penn. Rep. 307.

9. Is not a contract dissolved, when he who is to profit by another's fulfilling his contract or agreement, is the occasion why it is not carried into execution?

It is, and the party bound is discharged from his obligation.—*Whitney v. Brooklyn*, 5 Conn. Rep. 405. *Champion v. Hartshorne*, 9 Conn. Rep. 564. *Miller v. Ward*, Conn. Rep. 494.

10. Will an action for money had and received, lie where an executory contract has been in part executed?

It will not; but the party injured must resort to an action on the contract.—*Stodart v. Smith*, 5 Binney's Penn. Rep. 355. Or where it has been wholly executed on one part.—*Fuller v. Hubbard & Williams*, 6 Cowen's N. Y. Rep. 13. *Clarke v. Smith*, 14 Johns. Rep. 326. *Raymond v. Bernard*, 12 Johns. Rep. 274. *Caswell v. The Black River Co.* 14 Johns. Rep. 453.

11. May not a written executory agreement, before breach, be abandoned by a subsequent unwritten one?

It may.—*Buel v. Miller*, 4 New Hamp. Rep. 196.

The court, in this case, seem to have no doubt that executory agreements in writing, not under seal, might, before breach, be discharged and abandoned by a subsequent unwritten agreement, as well in cases where the original contract is required by the statute of frauds to be in writing, as where writing is unnecessary.—*Vide Davenport v. Mason*, 15 Mass. Rep. 92. *Hotchkiss v. Down*. 2 Conn. Rep. 136. *Seymour v. Minturn*, 17, Johns. Rep. 169.

12. Must not, in the sale or exchange of goods, the party rescinding the contract return the goods before suit is brought?

He must.—*Kimbal v. Cunningham*, 5 Mass. Rep. 502. *Connor v. Henderson*, 15 Mass. Rep. 319. *McNiven et al. v. Livingston et al.* 17 Johns. N. Y. Rep. 437.

OF THE PERFORMANCE OF CONTRACTS.

1. Is it not a question for the jury to say what is the reasonable time for the performance of a contract?

It is.—*Atwood v. Clarke*, 2 Greenlf. Me. Rep. 249.

2. May not a condition precedent be waived?

It may.—*Williams v. Bank of the U. S.* 2 *Peters' S. C. Rep.* 96. *Morton v. Fairbanks*, 11 *Pick. Mass. Rep.* 368.

3. Does the acceptance of another, or higher security, extinguish a previous demand?

It does not.—*Bangoree v. Hovey*, 5 *Mass. Rep.* 11. *Thatcher et al. v. Dinsmore*, 5 *ibid*, 299. *Manly v. McGee*, 6 *ibid*, 143. *Johnson v. Johnson*, 11 *ibid*, 359. *Day v. Leal*, 14 *Johns. N. Y. Rep.* 401. *Jackson v. Shaffer*, 11 *Johnson's Rep.* 513. *Burdock v. Green*, 15 *Johnson's Rep.* 247.

If, however, it is accepted as satisfaction, it does.—*Whitbeck v. Van Ness*, 11 *Johns. Rep.* 408. *Shelley v. Mandeville*, 6 *Cranch's U. S. Rep.* 253. *Boyd v. Hitchcock*, 20 *Johns. N. Y. Rep.* 76. *Wilt v. Ogden*, 13 *Johns. Rep.* 56.

It appearing in evidence, that promissory notes endorsed by third persons, as further security for the debt, were given by the debtor to the creditor, which were accepted as satisfaction for all demands. The court said, here was a beneficial interest acquired, and a valuable consideration received by the plaintiff, when they agreed to accept less than their demands. Here was an inconvenience to the defendant in procuring a surety, and also a benefit to the plaintiff. It certainly could not be called a *nudum pactum*.—See *Fitch v. Sutton*, 5 *East*, 221. *Steinman v. Magness*, 11 *East*, 390.

4. May not payment of a certificate of general deposit in a bank be demanded in specie, even if the deposit was made in the notes of the bank, which were much below par?

It may.—*The Bank of the Commonwealth of Kentucky v. Westen et al.* 2 *Peters' S. C. Rep.* 325.

Upon a deposit being made in the Bank of the Commonwealth of Kentucky, the cashier gave under his hand a certificate, that there had been "deposited to the credit of W. P. and W. seven thousand seven hundred and thirty dollars and eighty-one cents, which is subject to their order on presentation of this certificate." The deposit was made in the notes of the bank, and when the same were deposited, and when demand of payment was made, the notes were passing at one half their nominal value. When this certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, but they refused to receive payment in any thing but gold and silver. The language of the certificate is expressive of a general, not a specific deposit; and the act of incorporation is express that the bank shall pay and redeem their bills in gold or silver. The transaction then was equivalent to receiving or depositing the gold or silver; if the bank did not so understand it, they might have refused to receive it; and the plaintiffs would certainly have recovered the gold or silver, to the amount upon the face of the bills.—*Ibid*.

5. Is difficult or sufficient to excuse the performance of a contract?

It is not. Impossibility alone can do that.—*Huling v. Craig, Ad. dis.* 342.

6. Must not the plaintiff aver a performance, or an offer to perform, or a contract of the delivery of stock?

He must, otherwise he cannot sustain an action.—*Green v. Reynolds*, 2 J. R. 209. *Per Kent, Ch. J.*, so where G covenants to execute and deliver to R on a certain day, a deed of land; and R covenants to pay G on the same day a sum of money; held that these covenants are dependent, and that the delivery or tender of the deed, is a condition precedent to the payment of the money.—*Green v. Reynolds*, 2 J. R. 207. *Jones v. Gardner*, 10 *Ib.* 266. *Gazley v. Price*, 16 *Ib.* 267. *Harden v. Kretsinger*, 17 *Ib.* 293. *Rob v. Montgomery*, 20 *Ib.* 15. *Read v. Moor*, 19 *Ib.* 337.

7. If one party be incapable of performing his agreement, will not the other party be discharged?

As a general rule such seems to be the case.—*Tucker v. Woods*, 12 J. R. 190. *Van Benthusen v. Craspe*, 3 J. R. 198, 2d edit. And in such case, if the vendee has paid a part of the purchase money, he may not only disaffirm the contract, but may recover back the the money so paid.—*Jackson v. Wass*, 11 J. R. 525.

8. When the purchaser pays part of the consideration, on a parol contract, for the sale of land, can he maintain an action to recover it back?

Not if no fault or omission can attach to the vendor.—*Dowdle v. Camp*, 12 J. R. 451.

9. If a person agree to perform an act which was legal at the time the contract was made, and before the time of performance, or a breach of the contract, the act becomes illegal by an ordinance of the government, is not the obligation to perform the contract discharged?

It is, or if the ordinance be temporary, such obligation is suspended during its continuance.—*Bayless v. Phettyplace*, 7 *Massachusetts Rep.* 225.

10. Where the law casts a duty upon a person, will the non-performance of an impossible act be excused?

It will, if it be rendered impossible by the act of God, but a very different rule prevails, where a party enters into a contract, and engages to do an act; in the latter case it is considered the party's own folly that he did not provide against contingencies, and if there be no provision in the contract, excusing him, an inevitable accident or other contingency will not relieve him.—*Shubrick v. Salmond*, 3 *Burr.* 1637. *Aleyn Rep.* 27. *Cited by Lawrence, J., in 8 T. R.* 267.

11. If a freighter covenants to load a cargo, and is prevented by the prevalence of the plague, is he not liable on his contract?

He is.—*Parker v. Hodgson*, *M. & S.* 267.

12. Can any contract be carried into execution, which was made in violation of law?

It cannot, nor which has become illegal by some new law.—*Atkinson v. Ritchie*, *10 East*, 530. *Parker v. Hodgson*, *3 M. & S.* 267.

13. Upon a contract to deliver specific articles at a particular time and place; is not an offer of the article a good excuse in law for the non-performance of the contract?

It is.—*Wirt et al. v. Ogden*, *13 Johns. Rep.* 56. *Robinson v. Batchelder*, *4 New Hamp. Rep.* 195. *Robbins v. Luce*, *4 Mass. Rep.* 474. *Chase v. Flanders*, *2 N. Hamp. Rep.* 417.

14. Where the performance of one contracting party depends upon the furnishing materials, for which no time is limited, may not the former abandon the contract where there is an unreasonable delay in furnishing them?

He may.—*Newman v. Gillet*, *8 Taunt.* 325.

15. To determine a contract which is determinable upon notice, should it not be brought home to the contracting party?

It should.—*Smith v. Plomer*, *15 East*, 307.

16. Where there is a partial failure in the consideration upon the contract for the sale of goods by sample, may not the vendee return them, or require them to be taken away?

He may, and if they be bulky, the contract will be rescinded.—*Hind v. Whithouse*, *7 East*, 558.

17. Is not the acceptance of the note of a third person, for the price of goods sold, payment?

It is.—*Wilson v. Force*, *6 Johns. Rep.* 110. *Porter v. Talcott et al.* *1 Cowen's Rep.* 59. *3 Ib.* 272. *Whitbeck v. Van Ness*, *11 Johns. N. Y. Rep.* 453, 469. In this case Van Ness offered to give Whitbeck \$90 for a horse, if he would take D's note for that sum, payable in six months, to which Whitbeck assented, took the note to himself, and delivered the horse.

18. Is legal ignorance any excuse for the non-performance of a contract?

It is not.—*Bilbie v. Lumbey*, *2 East*, 470. But a mistake of fact induced by the opposite party is an excuse.—*Chatfield v. Paxon*, *2 East*, 471.

19. Can an agreement be explained by parol evidence ?

It cannot, unless there be some latent ambiguity in its terms.—*Coker v. Guy*, 3 B. & P. 565.

20. Where there is a fraud, may it not be shown to vacate the contract *in toto* ?

It may.—*Roberts v. Roberts*, 2 B. & A. 370. But the rule does not apply where both the parties are implicated.—*Ib.*

21. What is the rule where a party to a contract wishes to compel the other party to a performance ?

That he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal.—*The Bank of Columbia v. Hagner*, 465. 1 *Peters' Rep.* 9.

An averment of performance is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof.—*Ib.* 465. 1 *Peters' Rep.* 9. In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent unless a contrary intimation clearly appears.—*Ib.*

22. What must a party perform to entitle him to remedy on his contract ?

He must perform all that is legally required of him.—*Fallow v. Martin*, 1 *Harper's S. C. Rep.* 410.

23. Will not presumption of payment sometimes be indulged to guard against stale demands, not yet barred by a residence under a change of domicile ?

It will, and may attach to, and destroy the right of recovery.—2 *Kept*, 462. *Hub. de Conflictu Legum*, § 7, *Voet ad Pand.* 44, 3, 12. *Lord Kaimes' Equity*, b. 3, ch. 8, § 4. *Duplein v. De Roven*, 2 *Term Rep.* 540. *Nash v. Tupper*, 2 *Caines' Rep.* 402. *Ruggles v. Keeler*, 3 *Johns. Rep.* 263. *Pearsall v. Dwight*, 2 *Mass. Rep.* 84. *Hall v. Little*, 14 *Ibid.* 200. *Williams v. Jones*, 13 *East's Rep.* 439. *The British Linen Company v. Drummond*, 10 B. & Cres. 903. *Decouche v. Savatier*, 3 *Johns. Ch. Rep.* 218. *Medbury v. Hopkins*, 3 *Connecticut Rep.* 472. *Graves v. Greaves*, 2 *Bibb Rep.* 207. *Leroy v. Crowninshield*, 3 *Mason's Rep.* 151. *Union Cotton Manufactory v. Lobdell*, 19 *Martin's Lou. Rep.* 108. *Ersk. Institutes*, Vol. 2, p. 581, § 84. *Polhier in his Traité de la Prescription*, 251, and other foreign jurists, think that the *lex loci*, and not the *lex fori*, ought to govern in this case ; but the contrary conclusion is too well settled to be now questioned.—*Story's Com. on the Conflict of Laws*, 482, 487.

24. May not the vendee repudiate a contract for the sale of land, where there is an outstanding lease ?

He may ; but not where the incumbrance is removed before the deed is to be given.—*Greenby v. Cheevers*, 9 *Johns. N. Y. Rep.* 126. *Tucker v. Woods*, 12 *Johns. New-York Rep.* 190. *Jackson v. Wass*, 11 *Johns. Rep.* 525.

25. Where goods are sold in the city of London by a broker, to be paid for by a bill of exchange, and the seller is dissatisfied with the credit of the buyer, may he not rescind the contract in a reasonable time?

He may, unless a good bill be delivered to him, and the contract be complied with by the buyer.—*Hodgson v. Davies*, 2 *Canab.* 530.

REMEDY ON CONTRACTS.

1. Will not an action lie against a person not interested in the property, for making a false and fraudulent representation to the seller, whereby he sustained a damage, by trusting the purchaser on the credit of such misrepresentation?

It will.—*Upton v. Vale*, 6 *Johns. Rep.* 181. In the case in 6 *Johns. Rep.*, the doctrine of the case of *Paisely v. Freeman* was recognized, discussed, and settled in the Supreme Court of New-York. It was again recognized, discussed, and settled in *Gallagher v. Brunnel*, 6 *Cowen's Rep.* 346, and once more recognized, discussed, and settled in *Benton v. Pratt*, 2 *Wendell's Rep.* 385 ; and again, and very elaborately and powerfully enforced in *Allen v. Addington*, 7 *Wendell's Rep.* 1 S. C. 11 *Ibid.* 374. This is a striking sample of what are termed the *hominie* of the civil law. But the statute of 9 Geo. IV., ch. 14, commonly called *Lord Tenterden's Act*, has done away the application of the doctrine of *Paisely v. Freeman*, to English cases. That act extends the statute of frauds, by requiring a memorandum in writing, of another's character and ability, with a view to credit to be given him ; it equally applies to cases of verbal acknowledgments barred by the statute of limitations ; and it wonderfully relieves the courts, the profession, and the country, from the evils of fluctuating and contradictory decisions. These provisions of the English statute were adopted in *Massachusetts Revised Statutes for 1835*.

This principle was first established in England, after great discussion and opposition, in the case of *Paisely v. Freeman*, and though that case met with powerful resistance, it has been repeatedly recognized, and the doctrine of it is now well settled both in the English and American jurisprudence.—*Term Rep.* 51. *Eyre v. Dunsford*, 1 *East's Rep.* 318. *Haycraft v. Crary*, 2 *Ibid.* 92. *Carr, Ex parte*, 3 *Ves. & Bea.* 110. *Harner v. Alexander*, 5 *Boss. & Pull.* 241. *Wise v. Wilcox*, 1 *Day's Rep.* 22. *Russel v. Clarke*, 7 *Cranch's Rep.* 92. *Hart v. Talmadge*, 2 *Day's Rep.* 381. *Patten v. Gurney*, 17 *Mass. Rep.* 182.

The principle is, that fraud, accompanied with damage, is a good cause of action, and the solidity of the principle was felt and acknowledged by the writers on the civil law. Fraud without damage, or damage without fraud, says *Croke, J.*, in 3 *Bulstrode Rep.* 95, gives no cause of action,

but where these two do concur, and meet together, there an action lieth. By fraud, *Le Blanc, J.*, said, in 2 *East's Rep.* 108, he understood an intention to deceive, whether from an expectation of advantage to the party himself, or from ill will towards the other. Both of these propositions contain true doctrine on the point.—*Dig.* 50, 17, 47.

2. Is misrepresentation without design, sufficient for an action ?

It is not. But if recommendation of a purchaser, as of good credit, to the seller, be made in bad faith, and with knowledge that he was not of good credit, and the seller sustains damage thereby, the person who made the representation is bound to indemnify the seller.—*Polhier, Traité du Contrat de Mandat.*, Art. 21.

It is a very old head of equity, said *Lord Eldon*, that if a representation be made to another person, going to deal in a matter of interest upon the faith of that representation, the former must make the representation good, if he knew it to be false.—*Evans v. Bicknel*, 6 *Vesey*, 182. 2 *Kent*, 489, 490. Here again I must refer the student to 2 *Kent*, 490, and four subsequent pages, to the body of the work, and also to the notes appendant thereto.

3. Is not an infant liable for a wilful trespass ?

Yes ; such for instance, as injuring a horse, but not on the contract of hiring.—*Vasse v. Smith*, 6 *Cranch's Rep.* 226. 3 *Pick. Mass. Rep.* 492. *Campbell v. Stokes*, 2 *Wend. N. Y. Rep.* 137, S. C. 5 *Cowen's Rep.* 21.

The defendant, an infant, hired the plaintiff's mare, and drove her with great violence, and otherwise maltreated her, so that she died. It was contended that case, and not trespass, was the proper remedy.

Walworth, Chancellor, said, he was satisfied that an action on the case could not be maintained against an infant under such circumstances. If a horse be let to hire to an infant, and he does any wilful and positive act, which amounts to an election on his part, to disaffirm the contract, the owner is entitled to the immediate possession of the animal, and if the animal be injured, an action for trespass lies for the tort.

In the following case, *Chief Justice Marshall* said, this court is of opinion, that infancy is no complete bar to the action of trover, although the goods converted be in his possession, in virtue of a previous contract. The conversion is still in its nature a tort ; it is not an act of omission, but of commission, and is within that class of offences, for which infancy cannot afford protection.—*Vasse v. Smith*, 6 *Cranch's U. S. Rep.* 231.

Mr. Justice Van Ness said in the following cases, that infancy is a personal privilege, of which the infant alone can take advantage, either by plea or giving proof of it under the general issue.—*Haotness et al. v. Thompson et al.*, 5 *Johns. N. Y. Rep.* 160. *Van Bremur v. Cooper et al.*, 2 *Johns. Rep.* 279.

4. Does not the right to enforce the contract belong to the party who has the legal interest in it ?

It does.—*Dawes v. Peck*, 8 *T. R.* 330. *Doe v. Staple*, 2 *T. R.* 696.

5. Where a contract is made with A to pay him or B a sum of money for the use of B, must not the action be brought in the name of A who has the legal interest ? *

It must.—*Offy v. Ward*, 1 *Levinz*, 235. *Shack v. Anthony*, 1 *Maule & Selw.* 575.

9. When the contract is made with several, and their interest is joint, must they not all join in enforcing their demands ?

They must.—*Hill v. Tucker*, 1 *Term Rep.* 7.

7. Where one of several joint contractors dies, is not the interest in the contract in the survivors ?

It is ; and the representatives of the deceased contractor cannot join in an action upon the contract.—*Hill v. Tucker*, 1 *Term Rep.* 7. *Ander-son v. Martindale*, 1 *East*, 497.

8. Must not the action upon an express contract be brought against the party who entered it ?

It must.—*Young v. Brandor*, 8 *East*, 12.

9. Where the contract is joint, must not all the parties be sued together ?

They must ; but where it is several as well as joint, each may be separately sued, or the plaintiff may proceed against it jointly.—1 *Saunders*, 163.

10. If there be more than two parties to a joint and several contract, must not the plaintiff either sue them all jointly, or each of them separately ?

He must ; and he cannot proceed against an intermediate number.—13 *Petersdorff's Abridg.* 135, *note.* 3 *T. R.* 782.

11. If several persons dine together at a tavern, are they not *prima facie* liable jointly, for the whole bill ?

They are.—*Petersdorff's Abridg.* 135, *note.* 3 *Campb.* 51. But each of the officers of a regimental mess is only separately liable for his own share.—3 *Campbell*, 53, 168. 1 *Saund.* 291. 2 *Taunton*, 54. 2 *Burr.* 1197.

12. Will a contract be enforced, where the contracting parties have entered into it, under a misapprehension and ignorance of its defects ?

It will not, if such defects would have prevented the contract, had they been known at the time.—*Thompson v. Todd*, 1 *Peters' Rep.* 358. *Barnard v. Yates*, 1 *Nott & M'Cord's S. C. Rep.* 142. *Perkins v. Grey*, 3 *S. & R.* 331.

13. Where the time stipulated is not fulfilled, can the workman recover?

He cannot, unless the contract is waived by the employer.—*Mortmain v. Lefoux*, 6 *Martin's Lou. Rep.* 654. *Thorpe v. White*, 13 *Johns. N. Y. Rep.* 53.

14. Where there is no privity of contract or request, can an action be sustained?

It cannot, or where the workman goes beyond his contract, without consulting his employer.—*Freer v. Hardenburg*, 5 *Johns. N. Y. Rep.* 272. *Denter v. Hazen*, 10 *Johns. Rep.* 246. *Bartholomew v. Jackson*, 29 *Johns. N. Y. Rep.* 28. *Harton v. Norton*, 1 *McCord's S. Ca. Rep.* 25. *Phettyplace v. Steere*, 2 *Johns. N. Y. Rep.* 442. *Thorne v. Deas*, 4 *Johns. Rep.* 84. *Randolph v. Ware*, 3 *Cranch U. S. Rep.* 503.

15. Must not the consideration of the contract be stated?

It must.—*Woody v. Flourney*, 6 *Munf. Va. Rep.* 506. *Cooke v. Syms*, 2 *Call*, 39.

And on a contract for work and labor, where it has been performed the plaintiff need not declare specially.—*Mudd v. Mudd*, 3 *Har. & Johns. Rep.* 438. *Causton v. Burke*, 2 *Har. & Gill's Md. Rep.* 295.

16. To entitle the vendor to recover the purchase money, must not he aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified for the performance?

He must, and this averment must be sustained by proofs, unless the tender has been waived by the purchaser.—*Bank of Columbia v. Hagner*, 1 *Peters' U. S. Rep.* 467.

17. If two considerations be alleged, must not both be proved?

They must.—*Lansing v. M^r Killip*, 3 *Caines' N. Y. Rep.* 286.

Per Cur. If two considerations, both of which are good, be alleged as the groundwork of a special agreement reduced to writing; both must be proved, as laid, though the instrument say "for value received."

18. Does the infancy of one defendant, on joint and several contracts, destroy the action against the others?

It does not.—*Hartness v. Thompson et ux. & Nelson*, 5 *Johns. N. Y. Rep.* 150.

19. Is it necessary to aver in the declaration in a suit by a corporate body, that they were legally incorporated?

It is not.—*Rees v. Conococheague Bank*, 5 *Rand. Va. Rep.* 326.

20. Will not equity give relief in cases of written contract?

It will, where there is a plain mistake, clearly made out by satisfac-

tory proof, or even fairly and necessarily implied.—*Gillespie v. Moon*, 2 *Johns. Ch. R.* 595. *Hunt v. Roismanier*, 8 *Wheat.* 174, 211. 1 *Story's Commentaries on Eq. Jurisprudence*, 164, 176. *Newson v. Bufferlow*, 1 *Dev. N. C. Eq. Cas.* 379. 1 *Yeates' Penn. R.* 132, 138, 437. *Ball v. Story*, 1 *Sim. & Stew.* 210. *Lord Eldon's Case*, cited in 10 *Vesey*, 227. Mr. Justice Story, in his *Cam. on Eq. Jurisprudence*, 121, 194, has reviewed and collected most of the English and American cases, and draws the proper conclusions from them, with his customary ability and accuracy.

21. What facts in a contract of sale will place the goods at the risk of the buyer?

When the terms of the sale are agreed on, and the bargain is struck, and every thing that the seller has to do with the goods is complete, the contract becomes absolute without actual payment or delivery, and the property and the risk incident to the goods rest in the buyer.—3 *Kent's Com.* 492, 3d ed. 2 *Black. Com.* 448. *Lord Ellenborough in Hind v. Whitehouse*, 7 *East's Rep.* 571. *Tarling v. Baxter*, 6 *Barnw. & Cress.* 360. *Fletcher v. Howard*, 2 *Aiken's Ver. R.* 115. *Code Napoleon*, No. 1583. *Civil Code of Louisiana*, 2431, 1903, 1904, 2439. 1 *N. S. Mar. La. Rep.* 420. 3 *Ibid.* 588. 4 *Mar. La. R.* 330. *Poth. Vent. n.* 2, 4, 16, 31, 34, 36, 37, 309. *Obligations, n.* 4, 7. *Bail à Rente, n.* 111. *Toulier, IV. p.* 58; *V. p.* 238; *VI. p.* 214; *VII. p.* 14; *VIII. p.* 220; *IX. p.* 160; *X. p.* 591; *VII. p.* 304; *XIII. p.* 61; *XIV. p.* 270.

22. What is the effect of a plea of tender and refusal of goods?

If the debtor be sued, he may plead the tender and refusal, and he will be excused by the necessity of the case from pleading *encore prist*, and bringing the cumbersome articles into court; and it is not like the case of a tender of money, which the party is bound to keep good, and on a plea of tender to bring the money into court. The creditor is entitled to the money at all events, whatever may be the fate of the plea; *Le Grew v. Cooke*, 1 *Boss. & Pull.* 332; and there is equal reason that he should be entitled to the specific article tendered. But in *Weld v. Hadley*, 1 *N. H. Rep.* 295, it was decided, after a very able discussion, that on a tender and refusal of specific articles, the property did not pass to the creditor.

This was contrary to the doctrine declared in other cases, and the weight of argument, if not of authority, and the analogies of the law, would appear to lead to the conclusion, that, on a valid tender of specific articles, the debtor is not only discharged from his contract, but the right of property in the articles tendered passes to the creditor.—*Bro. Abr., tit. Tous Temps Prist, p.* 31. *Nicholas v. Whiting*, 1 *Roots's Rep.* 448. *Rix v. Strong*, 1 *Root's Reports*, 55. *Slingerland v. Morse*, 8 *Johns. Rep.* 474. *Code Napoleon*, No. 1257. *Pothier, Traité des Oblig., No.* 545. *Smith v. Loomis, supra.* *Mitchell v. Merrill*, 2 *Blackf. Ind. Rep.* 87. In *Bailey v. Simonds*, 6 *N. H. Rep.* 159, it was held that if a note be payable in goods at a particular place, on demand, the maker must have the goods always ready at the place.—*Mason v. Briggs*, 16 *Mass. Rep.* 453.

EVIDENCE OF A CONTRACT.

1. Is a receipt evidence of a contract ?

It is not, but of payment.—*Tucker v. Maxwell*, 11 *Mass. Rep.* 143. *Thompson v. Fausset*, 1 *Peters' Rep.* 185. *Hamilton v. M'Guire's Ex'rs*, 3 *Serg. & R.* 355. *Ensign v. Webster*, 1 *J. C.* 145. *House v. Low*, 2 *J. R.* 378. *M'Kinstry v. Pearsall*, 3 *J. R.* 319. *Tobey v. Barber*, 5 *J. R.* 68. *Putnam v. Lewis*, 8 *J. R.* 304, 2d ed. *Johnson v. Weed*, 9 *J. R.* 310. *Maize v. Miller*, C. C. 1806, *MS. Rep.*, *Whart. Dig.* 225.

2. Is it not well settled, that parol evidence of what passed before, and the execution of an instrument, is admissible in cases of fraud ?

It is.—*Boyce's Ex'rs v. Grundy*, 3 *Peters*, 210, 219. *Christ v. Deffenbach*, 1 *Serg. & R.* 464. *Hurst's Les. v. Kirkbride*, cited by *Tilghman*, *Ch. J.*, in *Wallace v. Baker*, 1 *Binn.* 616.

3. Is there not a difference between covenants in general, and covenants secured by a penalty or forfeiture ?

There is: in the latter case the obligee has his election; he may either bring an action of debt for the penalty, and recover the penalty, after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole; or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*.—*Gray v. Crosby*, 19 *J. R.* 219. *Atwel's Ex'rs v. Fowle*, 1 *Munf.* 175. *Martin v. Taylor*, C. C., April, 1803, *MS. Rep.*, *Whart. Dig.* 93. *Clark v. Bush*, 3 *Cowen*, 151. *Graham v. Bickham*, 4 *Dall.* 149. *Payne v. Ellsy*, 2 *Walsh*, 143. *United States v. Arnold*, 1 *Gall.* 348. *S. C. in Error*, 9 *Cranch*, 104. *Harris v. Clapp*, 1 *Mass. Rep.* 308. *Perrit v. Wallis*, 2 *Dall.* 252.

4. May not a party show, by extrinsic evidence, a greater consideration than the one expressed in a deed ?

He may.—*Clarke v. Brown*, 1 *Root's Rep.* 77. *Morse v. Shattuck*, 4 *N. Hamp. Rep.* 229. *Webb v. Peel*, 7 *Pick. Mass. Rep.* 247. *Ballard v. Briggs*, 7 *Pick. Rep.* 533. *Bendon v. Seymour et al.*, 3 *Conn. Rep.* 304. *Howes v. Barbour*, 3 *Johns. N. Y. Rep.* 506. *Bradley v. Blodget*, *Kirby's Reports*, 22. *Narthop v. Speary*, 1 *Day's Rep.* 23. *Maighey v. Haner*, 7 *Johns. Rep.* 341. *Hatch et al. v. Straight*, 3 *Conn. Rep.* 31.

5. Is parol evidence admissible to show that a contract involves a trust, not apparent on the face of it ?

It is not.—*Potter et al. v. The President and Fellows of Yale College*, 8 *Conn. Rep.* 52.

6. May not a collateral security, given for a debt, be given in evidence to show the amount of the debt ?

It may.—*Charles v. Scott*, 1 *Serg. & Rawle's Penn. Rep.* 294.
Dutricht v. Merchione, 1 *Dall.* 428. *Beach v. Lee*, 2 *Dall.* 257.

7. In an action for the non-performance of a contract, may not the defendant show that he was prevented from performing it by the plaintiff?

He may.—*Wilt & Green v. Ogden*, 13 *Johns. N. Y. Rep.* 56.

8. Must not a special contract be proved as laid?

It must, and a variance is fatal.—*Shephard v. Palmer*, 6 *Conn. Rep.*
 95. *Wash v. Gilmore*, 3 *Har. & Johns. Ma. Rep.* 480.

9. May not an agreement under seal as collateral security, be given in evidence to show the amount of the debt due?

It may.—*Charles v. Scott*, 1 *Leigh & Rawle's Penn.* 294.

10. Is compensation for a deficiency in the sale of land on general warranty, to be made out at the time it is discovered?

It is not, but at the time of the contract.—*Nelson v. Mathews*, 2 *Hen. & Munf. Va. Rep.* 164. And wherever a contract is entered into, for the delivery of a specific article, the value of that article at the time fixed for the delivery, is the sum the plaintiff ought to recover.—*Davis v. Ex'rs of Richardson*, 1 *Bay's S. Ca. Rep.* 105.

11. May not extrinsic evidence be given of the object and design of a bill of sale?

It may.—*Tuckerman v. Maxwell*, 11 *Mass. Rep.* 143. *Johnson v. Johnson*, 11 *Mass. Rep.* 259. *Stewart v. The State*, June T. 1828. 2 *Har. & Gills' Ma. Rep.* 114. *Barker v. Prentiss*, 6 *Mass. Rep.* 430. *Stackpole v. Arnold*, 11 *Mass. Rep.* 27.

12. Is book account, evidence of the sale and delivery of goods, where they were delivered to a third person?

It is not.—*Townley v. Wooley*, Cox's *N. J. Rep.* 377.

CONVEYANCE.

1. How are conveyances divided?

Sir Wm. Blackstone divides conveyances into two kinds, viz. conveyances at common law, and conveyances which receive their force and efficacy from the statute of uses. The first class is again subdivided into original or primary, and derivative or secondary conveyances.—2 *Black. Comm.* 309. Some of these conveyances have grown obsolete.

See further on this subject, 4 *Kent*, 480—500.

2. Can a person *out of possession* convey, by bargain and sale, such title as will enable the bargainee to recover in ejectment?

He cannot.—*Clay v. White*, 1 *Munf. Rep.* 162.

3. Does the rule, that a purchaser is bound by notice at any time before he received a conveyance, apply to a *lien* claimed under a written contract, so vague and indefinite as not to designate with any certainty the particular land in question?

It does not.—*Lewis v. Madison*, *Ibid*, 303.

4. Does *notice* of a *lien*, or incumbrance on property, bind the purchaser?

It does, if received by him at any time before the execution of the conveyance.—*Blair v. Owles*, 1 *Munford's Rep.* 38.

5. Is a purchasing agent a competent witness to prove that his principal had notice of an incumbrance?

He is, notwithstanding such agent joined in a deed conveying the property to the principal, free from the claim of any person whatsoever.—*Ibid*.

COPARCENARY.

1. What is an estate held in coparcenary?

An estate held in coparcenary, is where lands of inheritance descend from the ancestors to two or more persons. It arises either by common law, or particular custom. By common law, as where a person seized in fee-simple, or fee-tail, dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives, and co-heirs, are then called coparceners, or for brevity parceners only. Parceners by particular custom, are where lands descend as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c., and in either of these cases, all the parceners put together make but one heir, and have but one estate among them.—2 *Black. Comm.* 187.

2. From what does an estate in coparcenary always arise?

From descent. At common law it took place when a man died seized of an estate of inheritance, and left no male issue, but two or more daughters, or other female representatives in a remoter degree.—4 *Kent*, 366. In this case, they all inherited equally as co-heirs in the same degree, or in unequal proportions, as co-heirs in different degrees.—4 *Kent*, 366. *Litt. Sec.* 241, 242. They have distinct estates, with a right to the possession in common, and each has a power of alienation over her particular share.

Coparceners, in like manner as joint-tenants, may release to each other, and if one of them conveys to a third person, the alienee and the other coparceners will be tenants in common, though the remaining coparceners, as between themselves, will continue to hold in coparcenary. —4 *Kent*, 336. 1 *Preston on Estates*, 138.

3. In what three unities do coparceners resemble joint-tenants?

In unities of title, interest, and possession.

Parceners have the same remedy in equity for an account, as against each other for their share of rents and profits, as joint-tenants and tenants in common, though they are not mentioned in the statute of 3 and 4 Anne. This results from the equity cases prior to the statute, and the manifest reason of the thing.—1 *Ep. Cas. Abr. tit. Account A.* 1 note. *Drury v. Drury*, 1 Rep. in Chancery, 27. *O'Bannon v. Roberts*, 2 Danz's *Ken. Kep.* 54.

But the seisin of one coparcener is generally the seisin of the others, and the possession of one is the possession of all, except in cases of actual ouster. But they differ from joint-tenants in other respects, in a most material degree. Explained in 4 *Kent*, 366, and a few subsequent pages, where information respecting *Tenants in Common*, etc., may be obtained also.

4. In what points do parceners differ from joint-tenants?

1st. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore if two sisters purchase lands, to hold to them and their heirs, they are not parceners but joint-tenants, and hence it likewise follows that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas, not only estates in fee and in tail, but for life and years, may be held in joint-tenancy.

2d. There is no unity of time necessary to an estate in coparcenary. For if a man had two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are dead, their two heirs, are still parceners, the estate vesting in each of them at different times, though it be the same quantity of interest, and held by the same title.

3d. Parceners, though they have an unity, have not an entirety of interest. They are properly entitled each to the whole of a distinct moiety.—2 *Black. Comm.* 188.

COPYRIGHTS.

AS TO COPYRIGHTS OF AUTHORS.

The authors of books, maps, charts, and musical compositions, and the inventors and designers of prints, cuts, and engravings, being citizens

of the United States, or residents therein, are entitled to the exclusive rights of printing, reprinting, publishing, and vending them for the term of twenty-eight years from the time of recording the title thereof: and if the author, inventor, or designer, or any of them, where the work was originally composed and made by more than one person, be living, and a citizen of the United States, or a resident therein, at the end of the term, or being dead, shall have left a widow, or child, or children, either or all of them living, she or they are entitled to the same exclusive right for the further term of fourteen years, on complying with the terms prescribed by the Act of Congress.

These terms are, that the author or proprietor, before publication, deposit a printed copy of the title of the book, map, chart, musical composition, print, cut, or engraving, in the Clerk's office of the district wherein he resides, and which copy is to be recorded; and that he cause to be inserted on the title-page, or the page next following, of each and every edition of the book, and cause to be impressed on the face of the map, chart, musical composition, print, cut, or engraving, or upon the title or frontispiece of a volume of the same, the following words:

"Entered according to the Act of Congress, in the year —, by A B, in the Clerk's office of the district court of —" (as the case may be).

He is then, within three months after publishing the book or other work, as aforesaid, to cause to be delivered a copy of the same to the clerk of the said district court, who is once in every year to transmit a certified list of all such records of copyright, and the several books or other works deposited as aforesaid, to the secretary of state, to be preserved in his office. The violation of the copyright thus duly secured, is guarded by adequate penalties and forfeitures.

On the renewal of the copyright, the title of the work must be again recorded, and a copy of the work delivered to the clerk of the district, and the entry of the record noticed as aforesaid, at the beginning of the work; and all these regulations must be complied with, within six months before the expiration of the first term. And in addition to these regulations the author or proprietor must, within two months from the date of the renewal, cause a copy of the record thereof to be published in one or more of the public newspapers printed in the United States, for the space of four weeks.—*Act of Congress, Feb. 3, 1841, ch. 16.* And see further respecting the laws of copyrights, 2 *Kent*, 374—385, 3d edit.

CORPORATIONS.

1. What is a corporation?

A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested by the policy of the law, with the capacity of perpetual succession, and of acting, in several respects, however numerous the association may be, as a single individual.—2 *Kent*, 267.

It is an artificial body: Ayliff calls it a mystical body, a mere creation of the law, with none but express powers, *ad hoc*, or such implied powers as are strictly indispensable, or it is an artificial person created by the law of an independent state.

2. What is the chief object of the institution of corporations?

To enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another.—2 *Kent*, 267.

The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist.—*Providence Bank v. Billings & Pitman*, 14 *Peters' S. C. Rep.* 514.

3. How far back may we trace the history of corporations?

They were well known to the Roman law, and they existed from the earliest periods of the Roman republic. It would appear, from a passage in the Pandects, that they were copied from the laws of Solon, who permitted private companies to institute themselves at pleasure, provided they did nothing contrary to public law.

But the Romans were not so indulgent as the Greeks; they were very jealous of such combinations of individuals, and they restrained those that were not specially authorized; and every corporation was illicit that was not ordained by the decree of the senate, or of the emperor.

In the age of Augustus, as we are informed by Suetonius, certain corporations had become nurseries of faction and disorder, and that emperor interposed, as Julius Cæsar had done before him, and dissolved all but ancient and legal corporations.

We find, also, in the younger Pliny, a singular instance of the extreme jealousy indulged by the Roman government of these corporations. A destructive fire in Nicodemia, induced Pliny to recommend to the emperor Trajan, the institution, for that city, of a fire company of 150 men (*collegium fabrorum*), with an assurance, that none but those of that business should be admitted into it, and that the privileges granted them should be extended to no other purpose. But the emperor refused the grant, and observed, that societies of that sort had greatly disturbed the peace of the cities; and that whatever name he gave them, and for whatever purpose they might be instituted, they would not fail to be mischievous.—2 *Kent's Com.*, 3d edit.

4. In whom is the power of creating corporations in the United States, vested?

In the legislature only. Some corporations, however, now in existence were created originally by the crown, under the colonial administrations. In this country, also, as well as in England, corporations may exist

by prescription.—*Denton v. Jackson*, 2 Johns. N. Y. Ch. Rep. 325. *Billingham v. Snow et al.*, 3 Mass. Rep. 276. *Stockbridge v. Stockbridge*, 12 Ib. 400. *Green v. Dennis*, 6 Conn. Rep. 302.

5. What is the form necessary to be used in creating a corporation

No particular form of words is necessary; even a grant to a particular body of men to hold mercantile meetings, has been held to constitute a corporation.—*Ibid.*

A turnpike company, by accepting the charter of incorporation, making the road and receiving toll, are bound to keep the road in repair.—*Goshen Turnpike v. Sears*, 7 Conn. Rep. 86. *Com'th v. Worcester T. Corp.*, 3 Pick. 326.

So it was decided that a grant of lands to a county or hundred in England rendering rent, constitutes a corporation *quo ad hoc*, for that single purpose, without the words successors, &c.—2 Term R. 672.

6. At about what time were cities and towns first erected into corporations in Europe?

At about the beginning of the eleventh century; to which the consent of the feudal sovereigns was absolutely necessary, as many of their prerogatives and revenues were thereby considerably diminished.—*Robinson, Chas. V.*, 130.

7. How are corporations created in England?

In three ways, viz: by charter, act of parliament, and prescription; the latter, however, resolves itself into one or the other of the former, since every prescription supposes a grant, although, from length of time, no evidence of it can be produced, other than what results from immemorial usage.

OF THE DIVISIONS OF CORPORATIONS.

1. What are the most general divisions of corporations in the United States?

Into public and private. The former are such as are established by the government for political purposes, and such are counties, towns, and villages, the whole interest in which is in the state. In the latter the foundation being private, the corporation is private also. As in the instance of a bank charter applied for and procured by individuals, it is a private institution; so of canal, turnpike, bridge, and insurance companies; but a bank or hospital, and perhaps any other corporation, created by the government, for purposes purely public, and of general convenience and utility, are public institutions. The extensiveness of the object is said to be the criterion which determines a corporation to be a public charity.—*U. S. Bank v. Planter's Bank*, 8 Wheat. U. S. Rep. 907. *Bank of S. C. v. Gibbs*, 3 McCord's S. C. Rep. 377.

2. What is a corporation sole ?

It consists of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he cannot have. A bishop, dean, parson, and vicar, are given in the English books, as instances of sole corporations.—2 *Kent*, 273, 3d edit.

3. What are corporations aggregate ?

The union of two or more individuals in a body politic, with capacity of succession and perpetuity.—2 *Kent*, 274, 3d edit.

4. What kind of corporations are most in use ?

Aggregate corporations are most in use with us.—*Ibid.*

5. What is meant by ecclesiastical corporations ?

They are those of which the members are spiritual persons, and the object of the institution is also spiritual. With us, they are called religious corporations.—*Ibid.*

6. How are lay corporations divided ?

Into eleemosynary and civil.—*Ibid.*

7. What is an eleemosynary corporation ?

It is a private charity, constituted for the perpetual distribution of alms : in this class may be ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning, and endowed with property, by public and private donations.—*Ibid.*

8. What are *quasi* corporations

Churchwardens, 1 *Kid.* 29 ; overseers of the poor, 18 *J. R.* 418 ; supervisors of a country, 18 *Ib.* 424 ; the loan officers of a country, 8 *Ib.* 426 ; school districts, 13 *Mass.* 193 ; towns, parishes, cities, and counties, which are called *quasi corporations*.—9 *Cranch*, 52. 4 *Wheat.* 663. 7 *Mass.* 157. 1 *Greenlf.* 363.

OF THE POWERS AND DISABILITIES OF CORPORATIONS.

1. How are the powers and capacities of corporations considered under the English law ?

They very much resemble those under the civil law ; and it is evident, the principles applicable to corporations under the former, were borrowed from the Roman law, and from the policy of the municipal corporations established in Britain and the other Roman colonies, after these

countries had been conquered by the Roman arms. Under the latter system, corporations were divided into ecclesiastical and lay, civil and eleemosynary.—2 *Kent's Commentaries*, 269, 3d edit.

2. Under what disabilities were they placed?

They could not purchase, or receive donations of land without license, nor could they alienate without just cause. They could not act by attorney; and the act of the majority bound the whole; and they were dissolved by death, surrender, or forfeiture.—2 *Kent's Com.* 269, 3d edit.

3. What is the modern doctrine upon the subject of corporate powers?

It is to consider corporations as having such powers as are especially granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. The Supreme Court of the United States declared this obvious doctrine.—*Head & Amroy v. The Providence Insurance Company*, 2 Cranch, 127. *Marshall, Ch. J.*, 4 *Wheaton*, 636. *Beatty v. Lessee of Knowler*, 4 *Peters' U. S. Rep.* 152: and it has been repeated in the decisions of the state courts.—*The People v. Utica Insurance Company*, 15 *Johns. Rep.* 358. *The N. Y. Fire Insurance Company v. Ely*, 5 *Conn. Rep.* 560. *N. Y. Fireman's Insurance Company v. Sturges*, 2 *Cowen's Rep.* 664. *First Parish in Sutton v. Cole*, 3 *Pick. Rep.* 232. No rule of law comes with a more reasonable application, considering how lavishly charter privileges have been granted. As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode, the manner, and subject matter prescribed. The modern language of the English courts is to the same effect.—*Broughton v. The Manchester Water Works Company*, 3 *Barnw. & Ald.* 1. Where a corporation was created for purposes of trade, it resulted necessarily that they must have power to accept bills, and issue notes. But if a company be formed, not for the purposes of trade, but for other purposes, as for instance to supply water, the nature of their business does not raise a necessary implication that they should have power to make notes and issue bills; and there must be express authority to enable them to do it.

4. What are the principal rights, capacities, and incapacities of corporations, which are incident to them and tacitly annexed of course?

1. To have perpetual succession. 2. To sue or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them for the benefit of themselves and successors. 4. To have a common seal, for a corporation, being an invisible body, cannot manifest its intentions by any personal act or other discourse; it therefore acts and speaks only by its common seal. 5. To make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless

contrary to the laws of the land, and then they are void.—1 *Blackstone's Commentaries*, 475.

5. Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable to losses consequent on its having misconstrued the extent of its powers, in granting a license which it had no authority to grant, without taking that security for the conduct of the person obtaining that license, which its own ordinance had been supposed to require, and which might protect those who transact business with the persons acting under the clause?

It is not.—*Per Cur. Fowler v. The Corporation of Alexandria*, 409. The court find no case in which this principle has been affirmed.

6. How are the acts of corporation agents considered?

They are strictly construed; and it is the doctrine, that though a deed be signed by the president and cashier of a corporation, and be sealed with its corporate seal, yet the courts may look beyond the seal, and if it be affixed without the authority of the directors, and the fact be made affirmatively to appear, the instrument is null and void.

7. What are the principal exceptions in the English law, to the rule that a corporation cannot bind itself but under its corporate seal?

Where the acts done are of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal. Another exception is, where a corporation has a head, as a mayor, or a dean, who may give commands, which party may obey without the sanction of a common seal; *Randel v. Deane*, 2 *Lut.* 1497, or may bind the corporation by record. Another exception is, where the acts to be done, must be done immediately. But the appointment of the bailiff, who is to make distresses for the corporation, must be under seal. The same principles of necessity apply to corporations created for purposes of trade, such as the Bank of England. The very object of that institution requires that it should have the power of issuing bills of exchange and promissory notes. But this indulgence is not extended beyond cases of necessity.

8. What is the rule in the United States on this subject?

The rule as laid down by Judge Story is, that all parol contracts duly made by the authorized agents of a corporation are express promises; and all duties imposed on them by law, or benefits conferred at their request, raise implied promises for the enforcement.—*Baptist Church v. Mulford*, 3 *Halst. N. J. Rep.* 182.

9. What are the common law rules, as to the right of corporations to enact by-laws?

That they have power to make by-laws for the general good of the

corporation ; but they must be reasonable, and for the common benefit ; they must not be in restraint of trade, nor impose a burthen without an apparent benefit.—*Buffalo v. Webster*, 10 *Wend. N. Y. Rep.* 99.

10. What is the rule as to the rights of a corporation to be a trustee ?

That a corporation aggregate, with its usual plenary powers, cannot be seized of lands as trustee, for the use of an individual.—*Jackson v. Hartwell*, 8 *Johns. N. Y. Rep.* 330. When a corporation are created by statute for specific purposes, they cannot take and hold real estate for purposes foreign to their institution.—*Sutton v. Cole*, 3 *Pick. Massachusetts Rep.* 232.

11. What is the rule as to the right of a foreign corporation to sue ?

The doctrine is generally recognized that corporations have a right to sue in another state, but in Virginia it was decided that a banking corporation could not enforce a primary contract made in Virginia.—*Bank of Marietta v. Pindall*, 2 *Randolph's Va. Rep.* 465. The English doctrine is, that a foreign corporation may sue in the courts of England. And so of a foreign sovereign, and this both at law and equity.—*Hullett v. King of Spain*, 1 *Dow. & R.* 169. *Williamson v. Smoot*, 7 *Martin's Lou. Rep.* *N. Y. Fire Insurance Company v. Eley*, 5 *Cowp. Rep.* 560. *Brown v. Minis*, 1 *McCord's S. C. Rep.* 80.

An aggregate corporation in law, has no corporancy, although the individual corporations have ; yet in the case of a foreign corporation, it is an alien corporation, be its members who they may ; and in time of war, it may for some purposes partake of that character ; but in respect to mere municipal rights and duties, it has a local residence, and is an inhabitant and occupier.—*Society for Propagation of the Gospel v. Wheeler*, 2 *Gall. U. S. Rep.* 105.

12. What is the rule in the courts of the United States, as to sustaining jurisdiction where a corporation is a party ?

That the courts of the United States will look beyond the mere corporate character, to the individuals of whom it is composed ; and if they were citizens of a different state from the party sued, they are competent to sue in the courts of the United States, but all the corporation must be citizens of a different state from the party sued. The same principle applies to the individuals composing a corporation aggregate, when standing in the attitude of defendants, which does when they are in that of plaintiffs.—*Commercial & R. R. Bank of Vicksburg v. Slocumb et al.*, 14 *Peters*, 60. *Irvine for use of the Lumberman's Bank of Warren v. Lowry*, *ib.* *Strawbridge et al. v. Curtis et al.*, 3 *Cranch Rep.* 267. *The Bank of the United States v. Deveaux et al.*, 5 *Cranch*, 61. This is according to the English doctrine in the case of the *Mayor and Commonalty v. Wood*, 12 *Mod. Rep.*, there the Corporation of London brought a suit against Wood by their corporate name, in the Mayor's court ; and the judgment therein rendered was reversed in the K. B., because the court was deprived of its jurisdiction by the character of the individuals who were members of the

corporation. In that case, the objection, that a corporation was an invisible, intangible thing, a mere incorporeal entity, in which the characters of the individuals who composed it were completely merged, was urged, and was considered. The judges there, however, looked beyond the name, and noticed the characters of the individuals.

Either *trover* or *assumpsit* can be maintained against a corporation, as well as against natural persons.—*Foster v. Essex Bank*, 16 *Mass. Rep.* 245.

13. What is the effect of a *misnomer*?

A material and substantial mistake of the name will not warrant any proceedings. It cannot be regarded in such cases as a suit against the corporation.—10 *Coke*, 124. 2 *Stark Ev.* 424. 10 *Mass. Rep.* 360. 1 *B. & P.* 40. 2 *Cowen*, 780. 2 *N. Hamp. Rep.* 313. 5 *Mass.* 94, 101. *Burnham v. Strafford Savings Bank*, 5 *N. Hamp. Rep.* 446.

When a corporation is a party, the only proper mode of describing it, is by its corporate name, this being the only name or description by which a body politic is known in law; for the law takes no notice of the individual members of a corporation, as such, except when the individual right of the corporation is the subject in question.—*Gould P. L.*, 87.

14. What is the effect of a *misnomer* in a grant to a corporation?

Misnomer of a corporation in a grant or obligation, does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, if the same be shown by proper and apt averments and proof.—10 *Rep.* 122, 125. The law now is, that a departure from the style of the corporation, will not avoid its contracts, if it substantially appear that the particular corporation was intended; and a latent ambiguity may, under proper averments, be explained by parol evidence, in this as in other cases, to show the intentions.—*Inhabitants of Up. Allaway's Creek v. String*, 5 *Halst. N. J. Rep.* 325. *Medway C. M. v. Adams*, 10 *Mass. Rep.* 360. *Af. So. v. Varick*, 13 *Johns. N. Y. Rep.* 38. *Pres. &c. v. Myers*, 6 *S. & R. Penn. Rep.* 12.

15. How may the existence of a corporation be proved?

It may be proved by an exemplification of the act of incorporation and acts of *user* under it.—*Utica Insurance Company v. Cadwell*, 3 *Wend. N. Y. Rep.* 297. It may also be proved by reputation. *Dillingham v. Snow*, 5 *Mass.* 547, 276. *Stockbridge v. Stockbridge*, 12 *Mass. Rep.* 400.

A deed from a public hospital under its corporate seal, must be proved in the same manner as other deeds; it not being an institution of notoriety, its seal will not prove itself.—*Jackson v. Pratt*, 10 *Johns. N. Y. Rep.* 392.

When a corporation sues, they are bound on the general issue, to prove that they are a corporation.—8 *J. R.* 378. 14 *Ib.* 245, 6. *Trustees of V. Society v. Hills*, 6 *Cow. N. Y. Rep.* 23.

OF THE PERSONAL LIABILITY OF CORPORATIONS AND THE AGENTS OF CORPORATIONS.

1. Is it a misdemeanor at common law, for a citizen who is a legal voter, at a town meeting, to give in more than one vote ?

Curia. It is a general principle that where a statute gives a privilege, and one wilfully violate such privilege, the common law will punish such violation. In town meetings every qualified voter has equal rights, and is entitled to give one vote for every officer to be elected. The person that gives more, infringes and violates the rights of the other voters, and for this offence the common law gives an indictment; and in such case, the proper conclusion of the indictment is as follows: "to the great destruction of the freedom of elections, to the great prejudice of the other qualified voters in said town of S., to the evil example of others in like case to offend, and against the peace and dignity of the commonwealth aforesaid; and the law of the same in such case made and provided."

2. How is disorderly behavior at a town meeting held at common law ?

As a misdemeanor, and punishable by indictment.—*Commonwealth v. Hasey*, 16 *Mass. Rep.* 385.

3. How will a committee appointed on behalf of a corporation, covenanting under their hands and seals to pay money, be held ?

They will be held personally liable on such covenant. *Per cur.* This is not like a contract by an agent for the public and in the character of an agent. This cause must depend upon the construction of the deed. The defendants have put their own seals, and not the seal of the corporation. It is, therefore, their deed, and they must look to their principals for indemnity.—*Tibbetts v. Walker et al.*, 4 *Mass. Rep.* 595. *White v. Skinner*, 13 *Johns. Rep.* 307.

A corporation is not bound by the acts of an agent of its directors, unless it authorize the directors to appoint agents. The directors are the agents for the corporation, and *delegatus non potest delegare*. Such agents are personally liable for their contracts, though expressed to be made by them in the character of agent, and must look to their principal for indemnity.

4. May a corporation appoint one agent to sell their property and another to purchase the same for the corporation ?

They may not. They would in fact become both sellers and purchasers.—*Banks v. Judah*, 8 *Conn. Rep.* 145.

Where the treasurer of a turnpike corporation gave his notes in that capacity, for the proper debts of the corporation, it was holden that he was not personally liable.—*Mann v. Chandler*, 9 *Mass. Rep.* 335.

VISITATION OF CORPORATIONS.

What is the rule in England as to the visitation of corporations?

That the founder, his heirs, or assigns, are the visitors of all lay corporations. And, in general, the king being the sole founder of all civil corporations, and the endower, the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king; and of the latter, to the patron or endower.

Eleemosynary corporations are chiefly hospitals or colleges in the universities. These were all of them considered by the popish clergy, as of mere ecclesiastical jurisdiction; however, the law of the land judged otherwise; and, with regard to hospitals, it has long been held, that if the hospital be spiritual, the bishop shall visit; but if lay, the patron.—*Year Book*, 8 *Edward III.* 28. *Ass.* 29. 1 *Blackstone's Commentaries*, 481.

Where a statute creates a corporation for public purposes, and there being no individual founder, the legislature becomes the visitor of such an institution. But where there is a founder, the right of visiting eleemosynary corporations is vested in him and his heirs, unless it is given by him to some other person.—*Amherst Academy v. Cowles*, 6 *Pick.* 427. *Murdock v.* ——— 7 *ibid.* 303.

DISSOLUTION OF CORPORATIONS.

There is no pretence to say that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man. The dissolution of a corporation by a state legislature cannot, in any just sense, be considered within the clause of the constitution of the United States, on the subject, an impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts.

1. How may a corporation be dissolved?

A private corporation may lose its franchise by a mis-user or non-user of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto*, to ascertain and enforce the forfeiture.—*Terrett v. Taylor*, 9 *Cranch U. S. Rep.* 43. *Dart. Col. v. Woodworth*, 4 *Wheat.* 518, 661. *So. for Promoting the Gospel v. New Haven*, 8 *Wheat.* 464.

2. How in England may corporations be dissolved?

1. By act of parliament, which is boundless in its operation.
2. By the natural death of all its members, in case of an aggregate corporation.
3. By surrender of its franchise into the hands of the king, which is a kind of suicide.

4. By forfeiture of its charter through negligence or abuse of its franchise ; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings.—1 *Blac. Comm.* 485.

3. What is the rule in the United States as to the dissolution of corporations ?

That a public corporation, instituted for purposes connected with the administration of the government, may be controlled by the legislature.

In those public corporations there is in reality but one party, and the trustees or governors of the corporation are merely trustees for the public.

Grants of property and of franchise coupled with an interest, to public or political corporations, are beyond legislative control, equally as in the case of the property of private corporations.—*Story, J., in Dartmouth College v. Woodward*, 4 *Wheat.* 697, 700. *Town of Pawlett v. Clark*, 9 *Cranch's Rep.* 292.

A private corporation, whether civil or eleemosynary, is a contract between the government and the corporation ; and the legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judicially ascertained and declared.

A corporation may also be dissolved when an integral part of the corporation is gone, without whose existence the functions of the corporation cannot be exercised, and when the corporation has no means of supplying that integral part and has become incapable of acting.

A corporation aggregate may surrender, and in that way dissolve itself ; but then the surrender must be accepted by government, and be made by some solemn act, to render it complete.

A corporation may also be dissolved by non-user or mis-user. But the default must be judicially determined in a suit instituted for that purpose.—*Canal Company v. Rail Road Company*, 4 *Gill & Johns. R.* 1.

There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for default or abuse of power. The one is by *scire facias*, and that process is proper where there is a legal existing body, capable of acting, but who have abused their power. The other mode is by information in the nature of a *quo warranto* ; and that proceeding applies where there is a body corporate *de facto* only.—2 *Kent's Com.* 312.

COURT.

1. What is a court defined to be ?

A place where justice is judicially administered.—3 *Blackstone's Com.* 23.

2. What one distinction runs through all the courts of justice?

That some of them are courts of record; others not of record.—*Ibid.* 24.

3. What constitutes a court of record?

A court of record is that where the acts and judicial proceedings are enrolled in parchment, for a perpetual memorial and testament.—*Ibid.* 25. See further respecting courts, Jurisdiction.

COVENANTS.

1. What is a covenant?

It is defined to be an agreement in a deed, by which one person obliges himself to do something beneficial, or abstain from something which might be prejudicial to another, and can only be created by deed.—*Green v. Horne*, 1 Salk. 107. No particular form of words is requisite to make a covenant. The words “provided and agreed” make a covenant.—*Samways v. Eldsly*, 2 Mod. 74. The words “covenant, grant, and agree,” will operate as a lease.—*Richards v. Sely*, 5 Mod. 80.

A covenant is generally to do something in future, and differs from the case where an agreement refers to a thing, which is not to be done by the person of any, but to a thing to be executed in itself.—*Shep. Touch.* 162.

2. What is an express covenant?

An agreement in a deed to pay, amounts to an express covenant, and that, although the words “covenant, grant,” &c., are not inserted.—*Harwood et al. v. Hilliard*, 2 Mod. 268.

Where a man executes an agreement, and says, “I agree to do so and so,” he is liable to an action of covenant.—*Alchorne v. Saville et al.*, 6 Moore, 202.

Covenant will lie upon any words in a deed, purporting to be an agreement for the payment of money.—*Brice v. Carr et al.*, 1 Lev. 47.

3. What are implied covenants?

A lease for years, rendering rent, implies a covenant to pay rent. The word *rendendum* raises a covenant in law, which will run with the reversion.—*Harper v. Burgh*, 2 Lev. 306.

4. What are covenants real?

Those which have for their object something connected with land or other real property.—7 *Petersdf. Abr.* 94. They are said to run with the land, as they descend to the heir, and are transferred to the purchaser by the conveyance, and bind all claiming under the grantor or lessor, both his real and personal representatives.—*Co. Litt.* 384.

To make a covenant run with the land, and extend to the representatives of the lessor or lessee, there must be a privity of estate.—*Webb v. Russel*, 3 T. R. 393. *Stokes v. Russel*, *ibid.* 678.

Covenants of warranty, and for quiet enjoyment, which alone can be broken by future eviction, and covenants for further assurance, are real covenants, while covenants that the grantor is well seized, that he has good right to convey, that the premises are unencumbered, and others in the present tense, are personal covenants.—*Davis v. Lyman et al.*, 6 Conn. Rep. 249.

5. What is a personal covenant ?

One which does not affect the land demised, but is merely collateral to it.—*Spencer's Case*, 5 Co. 16. Instead of running with the land, and binding the person entering into possession, it affects only the covenantor during his lifetime, and the assets in the hands of his representatives, after his death, by reason of the privity of contract ; as if there be a covenant to build a wall upon land, not being a parcel of the land demised, or to pay a sum of money to the lessee, or a stranger, this is merely a personal covenant, and cannot affect the assignee, even though he be expressly named.—2 *Petersdf. Abr.* 95.

Lands were granted, charged with rent, and a covenant that part of them should be free from the rent, the court held that it was a mere personal covenant, and could charge the heir of the lessor only as it respected the assets descended.—*Cooke v. Earl of Arundel et al.*, *Hard.* 87.

6. What are mutual covenants ?

As where one covenants to serve, and the other covenants to pay.—*Gui v. Nicholls*, *Comb.* 265. Referring to arbitration is a mutual undertaking that each party shall perform his part of the award.—*Lupart v. Wellson*, 11 *Mod. Rep.* 170. A deed poll cannot raise mutual covenants.—*Lock v. Wright*, 8 *Mod. Rep.* 40.

Where the covenants are independent, an action may be maintained without averring the performance.—*Campbell v. Jones*, 6 T. Rep. 570. *Thorpe v. Thorpe*, 1 *Ld. Raym.* 662. The following rules are laid down in 7 *Petersdf. Abr.* 105.

1. If a day be appointed for the payment of the money, and the day comes before the thing for which the money is to be paid can be done, the action may be brought for the money before the thing is done, because the agreement is positive that the money shall be paid at the day.—*Large v. Cheshire*, 2 *Saund.* 319. *Pordage v. Cole*, 1 *Saund.* 319. *Campb. v. Jones*, 6 T. R. 570. *Ughtred's Case*, 7 Co. 10 b.

2. Where the consideration is to be performed before the day specified for the payment of the money, the performance of the consideration ought to be averred in an action for the money.—*Russel v. Ward, Wm. Jones*, 218.

3. Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach

of the covenant on the part of the defendant, without averring performance.—*Pordage v. Cole*, 1 *Saund.*, 320, *B. n.*

4. Where the mutual covenants go the whole consideration on both sides, performance must be averred.

5. Where two acts are to be done at the same time, as where one is to grant an estate on a certain day, and the other in consideration thereof, is to pay a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, though it be not certain which is to do the first act.

In mutual covenants, where there are reciprocal duties to be performed by each party, there the party alleging a breach, ought to show that he was always willing and ready to perform what on his part he was obliged to do. But if, on the contrary, he is not ready, or if he be the means of preventing it from being done, he shall not be permitted to come into court and take advantage of his own laches or neglect.—*Fannon v. Beauford & Tillman*, Bay's *S. Ca. R.*, 235. *Davis v. Crawford*, 2 *Const. Rep.*, 401.

It is said that where the participle "doing," "performing," &c., is prefixed to a covenant by another person, it is a mutual covenant, and not a condition precedent.—1 *Chitty on Plead.*, 315. 2 *Bl. Reports*, 1313. *Willes*, 146, 496.

7. What are dependent covenants?

Whether the covenants are to be considered dependent or as independent, must be decided by the intent of the parties; having regard to the whole instrument, no particular form of words being requisite to constitute a test whether the covenants are or are not dependent.—*Powers et al. v. Ware*, 2 *Pickg. Mass. Rep.*, 451.

Where the plaintiff covenanted that he would on or before the 1st of August, convey; and the defendant that he would on or before the 1st of August, pay, &c. The court held these covenants dependent.—*Glazebrook v. Woodrow*, 8 *T. Rep.*, 366. *Goodson v. Nunn*, 4 *T. R.*, 761.

8. What will constitute a joint and several covenant?

Where the interest of the parties is several; although the words of the covenant itself be joint, yet the covenant shall be taken to be several, and where the interest is joint, the action must be joint though the covenant in terms appear to be joint and several.—*James v. Emery et al.* 8 *Taunt.* 245. *Withers v. Bircham*, 3 *B. & C.* 254.

A and B covenanted for "themselves and every of them." *Per Cur.* The covenant is joint and several; for every of them is as much as for each of them.—*May v. Woodward*, *Freem.* 248. *Bolton v. Lee*, 2 *Lev.* 56. And if the interest of two lessees be joint, yet if their covenant for payment of rent be joint and several; one lessee may be sued for the non-payment.—*Enys v. Dornithorne*, 2 *Burr.* 1190, they being in the nature of securities for each other.—*Silley v. Hedges*, 1 *Stra.* 553.

And joint and several covenants in the beginning of a lease shall extend to all subsequent covenants, on the part of the covenantors, unless

there be something in the nature of the subject to restrain them to the former part of the instrument.—*The Duke of Northumberland v. Erington*, 5 T. R. 522.

CUSTOM.

1. What do customs include ?

The *lex non scripta*, the unwritten or common law, which embraces not only *general customs*, or the common law properly so called ; but also the *particular customs* of certain parts of the kingdom ; and likewise those *particular laws* that are by custom observed only in certain courts and jurisdictions.—*Intro. Blac. Comm., Lec. 3d.*

2. Where are they to be found ?

In the records of the several courts of justice, in books of reports, and judicial decisions preserved and handed down to us from times of the highest antiquity.—*Ibid.* 63, 64.

3. Of what degree of antiquity must maxims and customs be, to entitle them to validity ?

They must be of higher antiquity than memory or history can reach.—*Ibid.* 67.

4. Into what three kinds are they distinguished ?

1. General customs ; which are the universal rule of the whole kingdom, and from the common law in its stricter and more usual signification.

2. Particular customs ; which, for the most part, affect only the inhabitants of particular districts. m m

3. Certain particular laws ; which by custom are adopted and used only by some particular courts, of pretty general and extensive jurisdiction.—*Ibid.* 67.

5. How are maxims and customs to be known, and by whom is their validity to be determined ?

By the judges in the several courts of justice : they are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.—*Ibid.* 70.

6. What is the doctrine of the law, as to following precedents ?

They must be followed, unless flatly absurd or unjust.—*Ibid.* 70.

7. What three things do the rules relating to particular customs regard ?

Either the proof of their existence—their legality when proved—or their usual method of allowance.—*Ibid.* 75.

8. What are the seven requisites to make a custom good?

1st. That it have been used so long that the memory of man runneth not to the contrary.

2d. It must have been continued; any interruption would cause a temporary ceasing; the revival would give it a new beginning, which would be within the time of memory, and thereupon the custom will be void.

3d. It must have been peaceable, and acquiesced in; not subject to contention and dispute.

4th. Customs must be reasonable, or rather, taken negatively, they must not be unreasonable.

5th. Customs ought to be certain.

6th. Customs, though established by consent, must be (when established) compulsory, and not left to the option of every man, whether he will use them or not.

7th. Lastly, customs must be consistent with each other; one custom cannot be set up in opposition to another.—*Ibid*, 77, 78.

9. Will any usage or custom authorize an agent to depart from positive instructions?

It will not.—*Barksdale v. Brown & Tunis*, 1 *Nott & M'Cord's S. C. Rep.* 517. But the invariable usage of an agent, with respect to the funds with which he is intrusted, binds his employers, if that usage is known and recognized by them.—*Haven et al. v. Wentworth*, 2 *New Hampshire Rep.* 93.

10. Is a custom unreasonable for being injurious to private persons?

It is not, if it tends to the public and general advantage of the people.—3 *Salk.* 112. 4 *Mod. Rep.* 342. 6 *T. Rep.* 760. Customs, to render them valid, must be convenient, 12 *East*, 22. 14 *Ibid*, 367. 10 *Mod.* 133. 7 *Ibid*, 29. 2 *And.* 152. *Hob.* 329. 1 *Comm.* 274, n. 2 *Ld. Raym.* 777, and certain. *Naylor v. Scott*, 2 *Ld. Raym.* 1548. *S. C.*, *Barnard*, 159. But a custom contrary to statute cannot be supported; *Noble v. Durell*, 3 *T. R.* 271. It must not be contrary to the common law.—*Beckwith v. Harding*, 1 *B. & C.* 508.

11. Is a custom by banks, not to rectify mistakes unless discovered before the person leaves the room, good?

No, it is not.—*Gallatin v. Bradford*, 1 *Bibb's Ky. Rep.* 209.

12. Must not the evidence to establish a custom be clear, certain, and conclusive?

It must.—*Fouro v. Cassin*, 2 *Nott & M'Cord's S. C. Rep.* 174. *Eadi et al. v. East India Co.*, 2 *Burr.* 1221.

13. May not a usage or custom be proved by parol evidence?

It may.—*Drake v. Hudson and Franciess*, 6 *Har. & Johns. R.* 399.

14. If any of the terms used in a policy of insurance have, by the known usage of trade, and the practice as between the insurers and the insured, acquired an appropriate sense, are they not to be construed according to that sense?

They are.—3 *Kent*, 260. *Le Guidon*, ch. 12, art. 2. *Ord. de La Mer*, tit. *Des Assurances*, art. 4. *Code de Commerce*, art. 337. *Boulay Payty*, *Cours de Droit Com.*, tome iii., 411, 412.

And all mercantile contracts, if dubious, or made with reference to usage, may be explained by parol evidence of the usage.—*Coit v. Com. Ins. Co.*, 7 *Johns. Rep.* 385. *Allegre v. Maryland Ins. Co.*, 6 *Harr. & Johns.* 408. *Robertson v. Clark*, 1 *Bing.* 445. *Renner v. Bank of Columbia*, 9 *Wheat.* 591. *Columbia Ins. Co. v. Cobbett*, 12 *Ibid.*, 388. Note (a) 3 *Kent*, 260.

But the rule is checked by this limitation—that the usage, to be admissible, must be consistent with the principles of law, and not go to defeat the essential provisions of the contract.—*Palmer v. Blackburn*, 3 *Bing.* 61. *Bryant v. Com. Ins. Co.*, 6 *Pick. Rep.* 131. *Rankin v. Am. Ins. Co.*, 1 *Hall's N. Y. Rep.* 619.

If part of the policy should be written and part printed, and there should arise a reasonable doubt upon the meaning of the contract, the greater effect is to be attributed to the written words, for they are the immediate language selected by the parties, and the printed words contain the formula adapted to that and all other cases upon similar subjects.—*Ld. Ellenborough*, 4 *East*, 136. *Coster v. Phoenix Ins. Co.*, *C. C. Pen.*, 3 *Kent*, 260.

15. Is the rule peculiarly modern, respecting any terms used in a policy acquiring an appropriate sense between the insurers and the insured?

It is not. It appears to have been the established practice as far back as the time of *C. J. Rolle* and of *Lord Holt*.—*Pickering v. Barkley*, 2 *Roll. Abr.* 248. *Pl.* 10. *Sty.* 132. *Lethuller's Case*, 2 *Salk.* 443. And though *Lord Eldon*, in the case of *Anderson v. Picher*, 2 *Boss. & Pull* 168, regretted the rule, yet he admitted that it was too late to question its force, and that policies must be expounded with due regard to the usage of trade. To reject this testimony now, would produce the greatest injustice, for the contract must have been made and understood at the time by the parties, in reference to this mercantile and practical meaning of the terms employed.—*Cutter v. Powell*, 6 *Term Rep.* 320, 324, *et seq.* *Livingston & Gilchrist v. Maryland Ins. Co.*, 7 *Cranch*, 500. *Urquhart v. Barnard*, 1 *Taunt.* 450, 457. *Noble and another v. Keneway*, *Doug.* 510. *Vallance v. Dewar*, 1 *Camp.* 503. *Phillips' Ev.* 434. So a policy on goods, at and from Baltimore to Leghorn, the risk to continue until the goods should be safely landed at Leghorn, was held to be discharged by landing them at the Lazaretto near that place, that being the usage of the trade.—*Gracie v. Marine Ins. Co. of Baltimore*, 8 *Cranch*, 75. So in an action on a policy of insurance, on a voyage to any port in the Baltic, evidence was admitted to prove that the Gulf of Finland is considered, in mercantile contracts, as within the Baltic, although the two seas are treated as separate and distinct by geographers.—*Uhde v. Walters*, 2 *Camp.* 16.

16. Is the question for the court, or for the jury to decide, when evidence is offered for and against the existence of a custom?

It is a question exclusively for the jury.—*Allegre's Admrs. v. The Md. Ins. Co.*, 2 *Gill & Johns. Md. Rep.* 136.

17. May not a witness be examined to prove the course of a particular trade?

He may; but not to show what the law is.—*Ruan v. Gardner*, MS. *Rep. S. C. Wharton's Dig. Penn. Rep.* 252, 364.

18. Where the legal effect of an instrument, or of the terms used in it, has been settled, is any evidence of commercial usage admissible?

It is not.—*Edie v. East India Company*, *Burr. R.* 1216. *Fitch v. Barker*, 2 *Johns. Rep.* 327. *Homer v. Dorr*, 10 *Mass. Rep.* 26. *Winthrop v. Ins. Co.*, and *Rann v. Gardner*, C. C. U. S. P. 2 *Condy's Marsh.* 707.

So evidence of usage is inadmissible to show that a transaction was not usurious.—*Dunham v. Day*, 13 *Johns. Rep.* 40.

19. May not the common law be controlled by special custom?

It may.—*Halsay v. Brown et al.*, 3 *Day's Conn. Rep.* 346.

20. Is not a custom void, that a party shall not use a trade in a particular city?

It is, unless it be founded upon some consideration.—*Sty.* 111. 2 *Lev.* 210. 3 *ib.* 241.

21. May not local usages be proved by witnesses?

They may.—*Thomas v. O'Hara*, 1 *S. C. Const. Rep.* 308. As they are matters of fact to be proved, not of law to be settled by the court.—*Furniss et al. v. Horne et al.*, 8 *Wend. N. Y. Rep.* 266.

But where the general custom or usage has been settled by solemn adjudications, or where the usage is a matter of such general notoriety as to be known to every one, and to leave no doubt on the minds of a court or jury, proof will be admissible.—*Thomas v. O'Hara*, 1 *S. C. Const. Rep.* 306.

22. Where the terms of a policy are clear and unequivocal, will parol evidence be admitted to show a mistake, or to vary or explain them?

It will not, unless in those particular cases in which the usage of trade is allowed to be proved.—*New York Ins. Co. v. Thomas*, 3 *Johns. Cas.* 1. *Mumford v. Hallett*, 1 *Johns. Rep.* 433. *Cheviot v. Barker*, 2 *Johns. Rep.* 346. *Hogan v. Delaware Ins. Co.* C. C. U. S. P. *Condy's Marsh.* 345. *Vandewoorte v. Smith*, 2 *Caines' Rep.* 155. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 *Cranch*, 206.

23. When a usage is so established as to leave no reasonable doubt of its existence, does it not become a part of the law?

It does, and the court will decide upon it as such, without requiring it to be again proved.—*Consequa v. Willings*, 1 *Peters' U. S. C. C. Rep.* 231.

24. Does not the policy cover goods, if it is the ordinary course of the trade for the owner to employ a common public lighter to remove the goods from the ship to the shore?

It does; but if he was to employ his own lighter, or take the goods under his own charge, the insurer would be discharged.—3 *Kent*, 309. *Rucker v. London Insurance Co.*, cited 2 *Boss. & Pull.* 432, in *notis*. *Hurry v. Royal Exchange Assurance Co.* *Ibid*, 430. *Matthie v. Potts*, 3 *Ibid*, 23. *Strong v. Natally*, 4 *Ibid*, 16. *Coggeshall v. American Insurance Co.*, 3 *Wendell*, 283. *Note (d.)* 3 *Kent*, 309.

25. What is the true test of a commercial usage?

The true test of a commercial usage is, its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it.—*Smith & Stanly v. Wright*, 1 *Caines' Rep.* 43. *Trott v. Wood, Gallison*, 443.

DECLARATION.

1. What is the declaration, *narratio* or *count*?

It is the cause of complaint at large, set forth by the plaintiff, against the defendant.—3 *Black.* 293.

2. In what actions must the plaintiff lay his declaration, or declare his injury to have happened in the very country and place where it did really happen; and in what may he declare in what county he pleases?

The former must be strictly observed in local actions; but in transitory actions it is not necessary.—3 *Black.* 294.

3. For what purpose are different counts introduced into the same declaration?

In order that if the plaintiff fail in one, he may succeed in another.—3 *Black.* 295.

4. Has it not been decided that after verdict the court will do what it can to favor a declaration?

It has repeatedly; often and again. And the court will suppose every thing right unless the contrary appears on the record; and the gen-

eral scope of the authorities, is, that after verdict, every legal intendment is to be admitted in its support.

There is at the present day, more than there formerly was, a prevailing disposition in courts to support a declaration after the verdict, by legal intendment.—*Richardson v. Eastman*, 12 *Mass. Rep.* 505. *Colt v. Root*, 17 *Mass. Rep.* 235. *Hardman et al. v. Crook*, 2 *Yerger's Rep.* 127. *Bayard v. Malcolm et al.*, 2 *Johns. N. Y. Rep.* 550. *Punburn v. Ramsay*, 11 *Johns. Rep.* 141.

And indeed, a declaration, bad in substance, may be cured by the defendant's plea.—*Zerger v. Sailer*, 6 *Binney*, 6, 24. *Gelstone v. Hoyt*, 13 *Johns. Rep.* 141. *Charles v. Duplex*, 2 *Browne*, 319. *Horton v. Monk*, 1 *Browne*, 65. *Dunning v. Owen*, 14 *Mass. Rep.* 162. *Vau. v. Havens*, 8 *Johns. N. Y. Rep.* 84.

And a declaration against a firm, B & Company, without mentioning their names, is good after verdict.—*Pate v. Bacon & Co.*, 6 *Mun.* 219. Uncertainty in a declaration will be cured by verdict.—*Huntingtower v. Gardner*, 1 *B. & C.* 397.

So also an imperfect averment of necessary facts is cured by verdict; for it is only necessary to set out the substantial parts of the agreement.—*Harrel v. Alexander*, 3 *Rand.* 94. *Oystead v. Shed et al.*, 12 *Mass. Rep.* 506. *Colt v. Root*, 17 *Mass. Rep.* 229. *Mason v. Crump*, 1 *Call*, 675. *Buster's Ex'rs v. Wallace*, 4 *H. & M.* 82. *Johns. v. Potter*, 5 *S. & R.* 519. *Jordan v. Cooper et al.*, 3 *S. & R.* 564.

5. Is it not sufficient if the declaration contains every material part?

It is; and if the prior counts set out the consideration, and the last refers to them, it is sufficient.—*Lowery v. Brooks*, 2 *M'Cord's S. Ca. Rep.* 421. *Shaw v. Redmond*, 11 *S. & R.* 27. *Dend's Admr's. v. Scott*, 3 *H. & Johns. Md. Rep.* 38.

6. Must not a promise, founded on a past consideration, be laid to have been done on request?

It must; or at least it must appear that the party promising, was under a moral obligation to do the act himself, or procure it to be done.—*Stewart v. Eden*, 2 *Caines' Rep.* 152. *Comstock v. Smith*, 7 *Johns. N. Y. Rep.* 87. *Robertson v. Bethune*, 3 *Johns. Rep.* 350.

7. Where two declarations are filed, will not the court presume the cause was tried on that which was most perfect?

They will, and presume also that it was filed by the permission of the court.—*Pedan et al. v. Hopkins*, 13 *Serg. & Rawle's Penn. Rep.* 45.

But where no declaration appears to have been filed, it is impossible for the court to affirm the judgment. It is an error which the court cannot overlook or amend, without consent.—*Williamson v. Rainey*, 3 *Hawke's N. Ca. Rep.* 9.

8. Can there be a demurrer and plea to the same part of the declaration?

There cannot. It is the practice of this court, where the declaration is defective, to reverse the judgment altogether, and not to direct a replender.—*Ricket v. Snyder*, 5 *Wend. N.Y. Rep.* 104. *Shelton v. Pollock*, 1 *Hen. & Mun. Va. Rep.* 422. *Smith v. Walker*, 1 *Wash. U. S. Rep.* 135.

9. Is a "Junior," attached to a name, any part of it?

It is not, nor can the omission of it be taken advantage of, in a plea of abatement.—*Buffon v. Chadwicke*, 8 *Mass. Rep.* 103. *Oystead v. Shed and others*, 12 *Mass. Rep.* 506. *Cunningham v. Kimball*, 7 *Mass. Rep.* 65. *Baylies and others v. Phettyplace et al.*, *ibid.* 325.

10. Is it necessary to set out the middle name in declaring on an endorsement on a promissory note?

It is not.—*Hudson v. Goodwin*, 5 *Har. & J. Md. Rep.* 115.

11. Must not a person who sues as heir, show himself such in his declaration?

He must; so that his rights may judicially appear to the court, and the proportion of the estate due to him be ascertained.—*Treasurer of Pickaway v. Hall*, 3 *Hammond's Rep.* 227. *Ohio Condensed Rep.* 546.

12. Is the day alleged in the declaration varying from the one in which the promise was made, any ground for ordering a nonsuit?

None at all. This appears from the cases, *Carth.* 228. 1 *Stra.* 21. 5 *Stra.* 807. 1 *Salk.* 223. 1 *Ld. Raymond*, 124. And in *Union Bank of Maryland*, 1 *H. & G.* 324, the court said that the day laid in the declaration is frequently immaterial, provided it appears to have been before the action was brought.—*Jordan v. Cooper et al.*, 3 *S. & R.* 576. *Briggs v. The President, &c., of the Nantucket Bank*, 5 *Mass. Rep.* 94, 97. *Cleveland v. Welsh*, 4 *Mass. Rep.* 591. *Stout v. Russell*, *Yeates' Penn. R.* 334. *Charles v. Duplix*, 2 *Browne*, 319.

13. Is not a variance in the date immaterial, where the instrument is not set out verbatim?

It is.—*Field v. Field*, 9 *Wend. N.Y. Rep.* 394.

14. Is it not sufficient to state the substance of the instrument declared on?

It is, and the very words contained in it need not be set out.—*Cunningham v. Kimball*, 7 *Mass. Rep.* 65. *Hopkins v. Young*, 11 *Mass. Rep.* 302. *Bacon v. Page*, 1 *Conn. Rep.* 404. *Gray et al. v. James et al.*, 1 *Peters' U. S. C. C. Rep.* 482. *Johns. v. Potter*, 5 *Serg. & Rawle's Penn. Rep.* 519.

Judge Story remarked, in *Ferguson v. Haywood*, 7 *Cranch*, 413, that in general, courts of law lean against an extension of the principles ap-

plied to cases of variance. Mistakes of this nature are usually mere slips of attorneys, and do not touch the merits of the case; every important fact must be stated in setting out express contracts, whether written or by parol; but this strictness does not apply to those parts of the declaration which do not describe the contract itself, nor to any part of the declaration, if it purport to contain only the legal effect, or spirit of the contract.

15. Is it necessary in a declaration that the words "for value received," be set out in the endorsement of a promissory note?

It is not, and if it be, need not be proved.—*Wilson v. Codman's Exr.*, 3 *Cranch's U. S. Rep.* 193.

16. Where there is a subsisting special agreement, must not the parties declare upon it?

They must, and must prove it as laid.—*Elder v. Worfield*, 7 *H. & J.* 391. *Watkins v. Hodges et al.*, 6 *H. & J.* 38. *Pringle v. Samuel*, 1 *Bibb*, 172. *Stout v. Gallagher*, 2 *Marshall*, 160. *Perkins v. Hart*, 11 *Wheat.* 237. *Coursay v. Covington*, 5 *Har. & Johns. Md. Rep.* 45.

17. Must not the cause of action be described with certainty?

It must.—*Rex v. Horn*, *Cowp.* 682.—The court say that the certainty necessary in a declaration, means a clear and distinct statement of the facts which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegation, and by the court who are to give judgment.—*Id. Rex v. The Inhabitants of Lyme Regis*, 1 *Doug.* 159. And less certainty is requisite in stating facts that lie more particularly in the knowledge of the opposite party.—*Andrews v. Whitehead*, 13 *East*, 112. The object of pleading being to state facts of which the other party is supposed not to be cognizant.—*Rider v. Smith*, *T. R.* 767.

DECREE.

On an appeal from an interlocutory decree, if proper parties to the suit be wanting, the court will itself direct such parties to be made.—*Hooper & Wife v. Royster & Wife*, 1 *Munf. Rep.* 119.

A decree against devisees, holding by several and distinct devises, ought not to be joined, but *pro rata*.—*Mason's Devisees v. Peters' Admr.* *Ibid.*, 437.

DEED.

WHAT CONSTITUTES A DEED.

1. What is a deed in its general nature ?

A deed is a writing sealed and delivered by the parties.—2 *Blackstone's Commentaries*, 295. Or thus, it is an instrument in writing, upon paper or parchment, between parties able to contract, and duly sealed and delivered.—4 *Kent*, 452.

2. Of what does a deed consist ?

It consists of the names of the parties, the consideration for which the land was sold; the description of the subject granted, the quantity of interest conveyed, and lastly, the conditions, reservations, and covenants, if any there be.—4 *Kent*, 460.

3. Does not the title pass by the deed ?

It does, and not by recording it.—*Jackson v. Dubois*, 4 *Johns. Rep.* 216. *Jackson Ex dem. Merrick v. Post*, 9 *Cowen's N. Y. Rep.* 120. *Jackson v. Town*, 4 *Cowen*, 606.

4. May not ambiguous expressions in a deed be explained by the agreement that led to it ?

They may.—*Hogan v. The Delaware Insurance Company*, 1 *Wash. U. S. C. C. Rep.* 419.

5. Is not one seal sufficient for several grantors ?

It is.—*Mackey v. Bloodgood*, 9 *Johns. Rep.* 784. *Bohannon v. Lewis*, 3 *Monroe's Ky. Rep.* 376. *Ludlow v. Simond*, 2 *Caine's N. Y. Cases*, 1. *Per Cur. Mills, J.*, said explicitly, if there be twenty to seal one deed, and they all seal upon a piece of wax, and with one seal, yet if they make distinct and separate prints, this is a sufficient sealing, and the deed is good. *Shep. Touch.* 55. Modern authorities have still gone further, and decided that one may seal for the rest, with their consent, and the deed will be as binding, as if every one had put his several seal; and one may execute for another in his presence, and affix but one seal.—*Taylor v. Glaser*, 2 *S. & R.* 504.

6. Is it absolutely requisite that a deed should be sealed ?

It certainly is.—*Demming v. Bullitt et al.*, 1 *Black. Ia. Rep.* 241. *Per Cur. Blackford, J.*, a writing cannot be considered a deed, unless there be a seal actually made upon the instrument. The circumstance of its containing the words "*sealed with my seal*," &c., is not sufficient.—*Perk. Sac.* 129. *Moore v. Jones*, 2 *Lord Raymond*, 1536. *Warren v. Lynch*, 5

Johns. N. Y. Rep., 239. And a party who seals an instrument is not bound unless his name be mentioned in it.—*Catlin v. Ware*, 9 *Mass. Rep.* 218. *Fowler v. Shearer*, 7 *Mass. Rep.* 14. *Jones v. Carter*, 4 *Henn. & Munf.* 184. In the eastern states, sealing in the common law sense, is requisite; but in the southern and western states, from New-Jersey inclusive, the impression upon wax has been disused to such an extent as to induce the courts to allow (but with certain qualifications in some of the states) a flourish with the pen at the end of the name, or a circle of ink, or scroll, to be a valid substitute for a seal.—*Force v. Craig*, 2 *Halsted's Rep.* 272. *Alexander v. Jameson*, 5 *Binney's Rep.* 238. *Temple v. Logwood*, 1 *Wash. Rep.* 42. *Ralph v. Gist*, 4 *M'Cord's Rep.* 267. In Maryland a scroll has been considered a seal, from the earliest period of its judicial history.—*Trasker v. Everhart*, 3 *Gill & Johns.* 234, 246. In Virginia and Alabama there must be evidence of an intention to substitute the scroll for a seal.—1 *Munf. Rep.* 487. 1 *Minor's Alabama Rep.* 187. It is understood, that the scroll is, by statute, in New Jersey, Delaware, Virginia, Ohio, Indiana, Illinois, Missouri, and Tennessee, made to supply the seal. But the relaxation of the rule of the common law, in the substitution of a scroll for a seal, has not been carried further in New-Jersey, than to the case of instruments for the payment of money. In other cases, the seal retains its original character. By the territorial law of Ohio, in 1800, the scroll was extended to all written obligations, excepting deeds, bonds and wills.—*Overseers of the Poor of Hopewell v. Overseers of the Poor of Amwell*, 1 *Halsted's Rep.* 169. *Perrine v. Cheeseman*, 6 *Ibid.*, 174. *Revised Laws of New Jersey*, 305, § 1. *Chase's Statutes of Ohio*, Vol. I., 287. *Van Blaricum v. Yeo*, 2 *Blackford's Indiana Rep.* 322. 4th *Kent*, 452, and note C on the same page. Mr. Chancellor Kent says (respecting a flourish with the pen, at the end of the name, or a circle of ink, or scroll, to be a valid substitute for a seal), that this is destroying the character of seals, and it is, in effect, abolishing them, and with them the definition of a deed or specialty, and all distinction between writings sealed, and writings not sealed. Whether land should be conveyed by writing, signed by the grantor only, or by writing signed, sealed, and delivered by the grantor, may be a proper subject for municipal regulation. But to abolish the use of seals by the substitute of a flourish of the pen, and yet continue to call the instrument which has such a substitute, a deed or writing, sealed and delivered, within the purview of the common or the statute law of the land, seems to be a misnomer, and is of much more questionable import.—4 *Kent*, 353.

7. Does not the seal retain its original definition and character in New York?

It does.—4 *Kent*, 453. *Warren v. Lynch*, 5 *Johns. Rep.* 239.

8. Is not a writing not sealed and delivered, wholly inoperative as a deed?

It is, although intended by the parties.—*Arms v. Burt et al.*, 1 *Vt. Rep.* 303.

9. Is not a deed of land to be afterwards designated, valid ?

It is.—*Somes v. Skinner*, 3 *Pick.* 53. *Mayo v. Libby*, 12 *Mass. Rep.* 339. *Browne v. Maine Bank*, 11 *Mass. Rep.* 153. *Jackson v. Stephens*, 16 *Mass. Rep.* 110. *Fairbanks et al. v. Williamson*, 7 *Greenleaf's Maine Rep.* 96. *Varnum v. Abbott*, 12 *Mass. Rep.* 474. *Pray v. Pierce*, 7 *Mass. Rep.* 385. *Allen v. Seward*, 5 *Greenleaf*, 227.

10. May not a deed of bargain and sale be made to take effect *in futuro* ?

It may.—*Jackson v. Dunsbaugh*, 1 *Johns. N. Y. Cases*, 95. *Jackson v. McKenney*, 3 *Wend. Rep.* 235. *Rogers v. Eagle Insurance Comp.*, 9 *Wend. Rep.* 611.

11. Does not a lease of land as long as grass grows and water runs, convey the fee ?

It does.—*Stevens v. Dewing*, 2 *Vermont Rep.* 411. *Arms v. Burt et al.*, 1 *Vermont Rep.* 303. *Clapp v. Draper*, 4 *Mass. Rep.* 266.

12. What is the usual form of conveyance in the United States ?

Usually by bargain and sale, and possession passes *ex vi facti*, under the authority of the local statute, without the security of livery of seisin, or reference to the statute of uses.—4 *Kent*, 461.

In Delaware, Virginia and Kentucky, deeds operate under the statute of uses, as they did in New-York prior to the first of January, 1830, when the revised statutes went into operation. In Massachusetts, under the provincial act of 9 Wm. III., a simple deed of conveyance, without any particular form, and without livery of seisin, was made effectual, provided the intention was clearly declared.—*Story, J., in Durant v. Ritchie*, 4 *Mason's Rep.* 57. But deeds operating by way of raising a use, under the statute of uses, are also a valid mode of conveyance in the New England states.—*French v. French*, 3 *N. H. Rep.* 239. *Parsons, Ch. J.*, *Mass. Rep.* 32. Note (b.) 4 *Kent*, 461.

I apprehend, says Mr. Chancellor Kent, that a deed would be perfectly competent, in any part of the United States, to convey the fee, if it was to be to the following effect: "I, A. B., in consideration of one dollar to me paid by C. D., do bargain and sell (in New-York, grant), to C. D. and his heirs (or in New York and Virginia, his heirs may be omitted), the lot of land (describing it), witness my hand and seal," &c.

13. Are not conveyances good in many cases, when made to a grantee by a certain designation, without the mention of either christian or surname ?

They are, as to the wife of J. S., or to his eldest son, for *id est certum, quod potest reddi certum*.—*Jackson v. Cory*, 8 *Johns. Rep.* 385.

OF THE PARTIES TO A DEED.

1. Does not the deed of a *non compos mentis* convey a seisin?

If he is not under guardianship it does.—*Wait v. Maxwell*, 5 *Pick. Mass. R.* 217. *Worcester v. Eaton*, 13 *Mass. Rep.* 375. But the deed of a *non compos mentis*, under guardianship, is void.

2. Is not the deed valid when the grantee is not called by his true name, but by one acquired by reputation?

It is.—*Society for Propagating the Gospel v. Young*, 2 *New Hamp. Rep.* 310.

3. Will a mistake in the christian name of a party defeat the deed?

It will not.—*Greenly v. Steele*, 1 *N. H. Rep.*, 384. *Hatch v. Hatch*, 9 *Mass. Rep.* 311. *Worthington et al. v. Hyler et al.*, 4 *Mass. Rep.* 205.

4. Does not a deed to husband and wife in fee, create a joint tenancy?

It does.—*Shaw et al. v. Hearsay*, 5 *Mass. Rep.* 521.

5. Is there any particular form of words necessary to bind the principal by a deed?

There is not. But the power by which the agent acts should appear on the face of the instrument.—*Magill v. Hinsdale et al.*, 6 *Conn. Rep.* 464. *Rathbone v. Budlong*, 15 *Johns. Rep.* 1. *Hovey v. M'Gill*, 2 *Conn. Rep.* 680. An agent may execute a deed for his principal, but he must have authority from him by deed.—*Harrison v. Jackson*, 7 *T. Rep.* 206. *Wilks v. Back*, 2 *East*, 142. And the agent must execute the deed in the name of the principal.—*Fronter v. Cuyler*, 2 *Ld. Raym.* 1418. *White v. Small*, 6 *T. Rep.* 176.

6. Will a parol ratification give validity to a deed made by an agent not having authority under seal?

It will not.—*Stetson v. Paton et al.*, 2 *Greenleaf's Me. Rep.* 358.

7. Must not the power to make a deed be by deed?

It must.—*M'Murtry v. Frank*, 4 *Monroe's Rep.* 41.

8. Is not the assent of a grantee to be presumed to be a deed in his favor?

It is.—*Pearse v. Owens*, 2 *Hayw. N. C. Rep.* 234.

9. Are not legislative grants to two or more persons in fee to be construed as estates in common?

They are.—*Higbee et al. v. Rice*, 5 *Mass. Rep.* 344.

10. To what time back does a sheriff's deed relate ?

It relates back to the time of sale.—*Case v. Degoes*, 3 *Caines' Rep.* 261. *Jackson v. Baird*, 4 *Johns. Rep.* 234. *Heath v. Ross*, 12 *Johns. Rep.* 140. *Johnson v. Stagg*, 2 *Johns. Rep.* 520. *Jackson ex dem. Deforest et al. v. M^r Michael et al.*, 3 *Cowen N. Y. Rep.* 75. *Jackson v. Bull*, 1 *Johns. Cas.* 81.

11. Is not a deed made by an agent after the death of his principal, but before it was known, void ?

It is, and the money may be recovered back.—*Harper et al. v. Little*, 2 *Green. Me. Rep.* 14. *Bergin v. Bennett*, 1 *Caines' N. Y. Cas.* p. 3.

12. If a deed has not been proved, acknowledged, and recorded, and would therefore be insufficient against subsequent purchasers, without notice, will not parties who claim under such deed, have a right to come into a court of equity, for a discovery upon the ground of notice ?

They will, and if notice should be brought home to subsequent purchasers, the complainants have a right to a relief, by a decree quieting the title.—*Findlay et al. v. Hinds & Wife*, 1 *Peters' U. S. Rep.* 245.

13. Can the privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, be legally proved by parol testimony ?

It cannot.—*Elliot et al. v. Piersol et al.*, 1 *Ibid*, 338.

14. Does the deed of a *feme covert*, conveying her interest in lands which she owns in fee, pass her interest, by the force of its execution and delivery, as in the common case of a deed by a person under no legal incapacity ?

It does not. In such cases an acknowledgment gives no additional effect between the parties to the deed. It operates only as to third persons under the provisions of recording and kindred laws.

The law presumes a *feme covert* to act under the coercion of her husband ; unless before a court of record, a judge, or some commissioner in England, by a separate acknowledgment, out of the presence of her husband ; or, in these States, before some court, or judicial officer authorized to take and certify such acknowledgment.—*Hepburn v. Dubois' Lessee*, 12 *Peters' U. S. Rep.* 345.

15. Where a deed of trust is executed to secure a debt, will a court of equity interfere to delay or prevent a sale according to the terms of the trust ?

Never, unless in case of some extrinsic matter of equity, and the only right of the grantor, in the deed, is the right to any surplus which may remain of the money, for which the property was sold.—*The Bank of the Metropolis v. Guttschlick*, 14 *Ibid*, 19.

16. When a deed is executed to two or more persons, and one dissents to the conveyance, are the others vested with the whole property ?

No, only an equal proportion.—*Treadwell v. Buckley et al.*, 4 Day's Conn. Rep. 395.

17. Is it necessary that a deed by an administrator, should recite the authority by which it is given ?

It is not ; it is sufficient to refer to it.—*Langdon v. Strong et al.*, 2 Vi. Rep. 234. *Roberts v. Whiting*, 16 Mass. Rep. 186. *Inman et al. v. Jackson*, 4 Greenleaf, 237.

18. Are not recitals in a deed evidence against the party making them ?

They are.—*Jackson ex dem. v. Parkhurst et al.*, 9 Wend. 209.

19. Is not a recital of a deed made by a grantor when an infant, in his deed, after full age, a confirmation of the deed ?

It is.—*Phillips et al. v. Green*, 5 Monroe's Rep. 344.

20. Is it necessary in a deed for an executor to set forth facts in proof of his authority ?

It is not.—*Inman et al. v. Jackson*, 3 Greenleaf's Me. Rep. 227. *Harlow v. Pike*, 3 Green's Rep. 438. Nor in fact is it necessary for an administrator, guardian, or collector of taxes, to set forth in their deeds all the anterior facts as to their authority and proceedings ; they need only state the capacity in which they profess to act.

21. Does not the notice of a lien or incumbrance on property bind the purchaser ?

It does, if received by him any time before the execution of the conveyance.—*Blair v. Cowles*, Munf. Rep. 38.

In a suit in equity by the claimant of an incumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party.—*Ibid.*

22. Is a purchasing agent a competent witness to prove that his principal had notice of an incumbrance ?

He is, notwithstanding such agent joined in a deed, conveying the property to the principal, free from the claim of any person whatsoever.—*Ibid.*

23. Can a person out of possession convey by a bargain and sale such a title as will enable the bargainee to recover in ejectment ?

He cannot.—*Clay v. White*, *Ibid.*, 162.

24. Does the rule, that a purchaser is bound by notice at any time be-

fore he receives a conveyance, apply to a *lien* claimed under a written contract so vague and indefinite, as not to designate with any certainty the particular land in question ?

It does not.—*Lewis v. Madison, Ibid, 303.*

If land be listed by the commissioners of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser, the proper resort of the rightful owner for relief seems to be a court of equity, by which the deed may be cancelled, and a release or re-conveyance of the land decreed.—*Yancy v. Hopkins, Ibid, 419.*

DELIVERY OF A DEED.

1. Is the delivery of a deed necessary ?

Essentially so, for it takes effect only from the delivery.—4 *Kent, 454. Lessee of Sickard et al. v. Davis et al., 6 Peters' U. S. Rep. 124.*

2. May not possession, in certain cases, be evidence of delivery ?

It may.—*Mallory v. Aspinwall, 2 Day's Conn. Rep. 280.*

3. Must not the grantor seek the grantee to make the delivery ?

He must.—*Burch v. Young, 3 Marshall's Ky. Rep. 419.*

4. Where the deed is delivered upon condition, or as an *escrow*, does it not take effect, after the performance of the condition, from the first delivery ?

It does.—*Ruggles v. Lawson, 13 Johns. N. Y. Rep. 285.*

5. Must there not be an acceptance, express or implied ?

There must.—*Jaques v. Methodist Episcopal Church, 17 Johns. Reports, 548. Jackson ex dem. v. Richards, 6 Cowen's N. Y. Rep. 617. Long v. Ramsay, 1 Serg. & Rawle's Penn. Rep. 72.*

6. May not a deed be delivered to a stranger as an *escrow* ?

It may ; which means a conditional delivery to the stranger, to be kept by him until certain conditions be performed, and then to be delivered over to the *grantee*.—4 *Kent, 454.*

Until the condition be performed, and the deed delivered over, the estate does not pass, but remains in the grantor.—*Jackson v. Catlin, 2 Johns. R. 248. Perkins, § 137, 138, 142. Johnson v. Baker, 4 Barnw. & Ald. 440. Carr v. Hoxie, 5 Mason's Rep. 60.* Generally, an *escrow* takes effect from the second delivery, and is to be considered as the deed of the party from that time ; but this general rule does not apply when justice requires a resort to fiction. The relation back to the first delivery,

so as to give the deed effect from that time, is allowed in cases of necessity, to avoid injury to the operation of the deed, from events happening between the first and second delivery. Thus if the grantor was a *feme sole* when she executed the deed, and she married before it ceased to be an *escrow* by the second delivery, the relation back to the time when she was *sole*, is necessary to render the deed valid. But if the fiction be not required for any such purpose, it is not admitted, and the deed operates according to the truth of the case, from the second delivery.—4 *Kent*, 455.

7. What is the general principle of law on this subject ?

That in all cases where it becomes necessary, for the purposes of justice, that the true time, when any legal proceeding took place, should be ascertained, the fiction of law introduced for the sake of justice, is not to prevail against the fact.—*Perkins*, § 138. *Butler & Baker's Case*, 3 Co., 35, b. 36, a. *Frost v. Beekman*, 1 Johns. Chan. Rep. 288. *Littleton v. Cross*, 3 Barnw. & Cress. 317.

8. Is not the deed void, if an illiterate man be induced to sign it by misrepresentation, after a refusal to read it ?

It is, and it is essential to the validity of a deed that it should be delivered.—*Jackson v. Hayner*, 12 Johns. N. Y. Rep. 469. *Hullenback v. Dewitt*, 2 Johns. Rep. 404. *Fitch et al. v. Forman*, 14 Johns. N. Y. Rep. 172. *Clarke v. Wray*, 1 Har. & Johns. Md. Rep. 323. *Mallory v. Aspinwall*, 2 Day's Conn. Rep. 280.

To give efficacy to a deed, it must be delivered.—*Gould v. Nicholson*, 8 Mod. 242. No particular form is necessary to perfect the delivery of a deed.—*Murray v. Earl of Stair*, 2 B. & C. 82. The usual mode of delivering a deed is to take it up and say, "I deliver this as my act and deed." But a deed may be delivered without any acts, but merely by words, as if the writing lies on the table, and the feoffer says to the feoffee, "go take up the said writing, it is sufficient for you," or "it will serve your turn," or "take it as my deed," it is sufficient.—*Shep. Touch.* 58. Whether a deed has been delivered, or not, is a question for the jury.—*Murray v. Earl of Stair*, 2 B. & C. 82.

9. May not a delivery of a deed be by acts, or by words, or by both ?

It may.—*Chadwick et al. v. Webber et al.*, 3 Greenlf. Me. Rep. 141. *McCoy v. Shoots et al.*, 2 Little's Ky. Rep. 375. *Cooks v. Hendricks*, 4 Monroe's Rep. 500.

10. May not acceptance of a deed be presumed ?

It may, and the subsequent assent of the grantee to a delivery in his absence, will ratify the delivery.—*McDowell v. Cooper et al.*, 14 Serg. & Rawle's Penn. Rep. 296. *Harrison v. Trustees of P. Academy*, 12 Mass. Rep. 460. *Canning & Wife v. Pinkham et al.*, 1 New Hamp. Rep. 353. *Buffon v. Green*, 5 New Hamp. 71. *Goodrich v. Walker*, 1 Johns. N. Y. Cases, 253.

11. Is it not equivalent to a tender, where a party would have delivered a deed but for the evasions of the other party?

It is.—*Borden v. Borden*, 5 *Mass. Rep.* 67.

12. Is it not a matter of fact for the jury, whether the delivery is absolute or conditional?

It is.—*Clark v. Guilford*, 10 *Wend. N. Y. Rep.* 310.

13. Does a declared intention to deliver, furnish any probable presumption of delivery?

It does not.—*Hale v. Hills*, 8 *Conn. Rep.* 39. *Wheelright v. Wheelright*, 2 *Mass. Rep.* 452.

14. Is it a specialty, where it is stated in the body of the deed, that the parties have set their hands and seals, yet not sealed and delivered?

It is not.—*Taylor et al. v. Glasser*, 2 *Serg. & Rawle's Penn. Rep.* 502. *McDill v. McDill*, 1 *Dallas*, 63.

OF RECORDING OF DEEDS.

1. What is required to make a deed valid against *bona fide* purchasers?

By the statute law of every state in the Union, all deeds and conveyances of land, except certain chattel interests, are required to be recorded upon previous acknowledgment of proof.—4 *Kent*, 456.

By the *New-York Revised Statutes*, Vol. I. 756, Sec. 1, & 762, Sec. 36, all conveyances of lands, tenements, and hereditaments, and chattels real, except leases for a term not exceeding three years, must be recorded. The same law in Massachusetts, but the exception reaches to leases not exceeding seven years.—*Massachusetts Revised Statutes of 1835*. The usage of recording deeds in the records of the towns, where the lands lay, prevailed from the early settlement of New England. By the laws of Massachusetts, in 1641, all deeds of conveyance, whether absolute or conditional, were required to be recorded, that “neither creditors might be defrauded, nor courts troubled with vexatious suits or endless contentions.”—*Holmes' Annals*, Vol. I. 261. In the Plymouth colony, conveyances, including mortgages and leases, were required to be recorded, as early as 1636; in Connecticut in 1639; in New Jersey in 1676, 1683, and 1698; in North Carolina in 1715; and in Virginia from the earliest periods.—*Bailie's Historical Memoir*, Vol. I. 239. See also, *Ib.* Vol. II. 111. 1 *Trumbull's History of Connecticut*, 111. *Leaming & Spicer, New Jersey Collections*, 153, 368, 382, 541. 5 *Yerger's Rep.* 124. 1 *Henning Stat.* 248. *Hurst v. Hurst*, 2 *Wash. Cir. Rep.* 74. *State of Connecticut v. Bradish*, 14 *Mass. Rep.* 296. *Griffith's Register*, 4 *Greenleaf*, 20. *Tart v. Crawford*, 1 *McCord's Rep.* 265. *Cabiness v. Mahon*, 2 *Ibid.* 273. *Story, J., in West v. Randall*, 2 *Mason's Rep.* 206. *Colbey v. Kenniston*

4 *New Hampshire Reports*, 262. *Montgomery v. Dorion*, 6 *ibid*, 254. *Tuttle v. Jackson*, 6 *Wendell's Reports*, 213. *Hewes v. Wiswell*, 8 *Greenleaf's Reports*, 94. *Ricks v. Doe*, 2 *Blackford's Indiana Reports*, 346. 4 *Kent's Commen.* 457, note (a.) and part of note (b.) See balance of note (b.) and a few more notes in the subsequent pages, respecting the laws of different states on this subject.

2. Against whom, only, will a deed be good, if not recorded ?¹

Against the grantor and his heirs and devisees, and they are void as to subsequent *bona fide* purchasers and mortgagees, whose deeds shall be first recorded.—4 *Kent*, 456. Much information respecting the laws of different states on this subject, may be obtained by examining this and subsequent pages.

3. Upon what does the mode of proof and the coercion of the attendance of witnesses, for the purpose of proving deeds, &c., depend ?

Upon the local laws of the several states, and so does the effect of such proof also.—4 *Kent*, 457. In all the states (except in Louisiana, where the law is peculiar on this subject), *femes covert*s are competent to convey real estate, with the consent of their husbands, who are to be parties to the conveyance ; and the wife is to be separately and privately examined by the officer respecting the free execution of the deed. This private examination seems to be required in all the states, with the exception of Massachusetts, Connecticut, and perhaps one or two others.—4 *Kent*, 458. The *New-York Revised Statutes* contain minute and specific directions on this subject of the proof and recording of conveyances of real estate.—*Vol. I.* 757—763. As to the practice of recording deeds in England and Scotland, see 4 *Kent*, 459.

4. Does recording give any preference, where the party had knowledge of a former deed ?

It does not.—*Farnsworth v. Childs*, 4 *Mass. Rep.* 637. *Norcross v. Widgery*, 2 *Mass. Rep.* 506. *Hubble v. Mead*, 2 *Vermont Rep.* 544. *Stewart v. Thompson*, 3 *Vermont Rep.* 255. *Dixon v. Parmlee*, 2 *Vermont Rep.* 19.

OF CONSIDERATION IN A DEED.

1. Must there not be a money consideration, to constitute a deed of bargain and sale ?

There must.—*Pacca v. Forwood*, 2 *Har. & M'Henry's Md. Rep.* 175. *Cheney v. Watkins*, 1 *Har. & Johns. Md. Rep.* 527.

2. Does the validity of the deed depend upon the amount of the consideration ?

It does not.—*Jackson v. Delancy*, 4 *Cowen's N. Y. Rep.* 430.

Rogers v. Eagle Fire Ins. Co. 9 *Wend. N. Y. Rep.* 611. *Jackson v. Florence*, 16 *Johns. N. Y. Rep.* 48. *Jackson v. Fish*, 10 *Johns. Rep.* 456.

3. Do not the words, "has bargained and sold," pass the estate?

They do.—*Jackson ex dem. Murphy & Wife v. Van Hoesen. Jackson v. Kisslebrook*, 10 *Johns. N. Y. Rep.* 337.

4. May not the consideration-money, expressed in the deed to have been paid by the grantee, be shown to have been paid by another person?

It may.—*Scooby v. Blanchard*, 3 *N. H. Rep.* 170. *Pritchard v. Brown*, 3 *N. H. Rep.* 397.

5. Where the consideration is expressed, can any averment to the contrary be made?

There cannot.—*Welt v. Franklin*, 1 *Binney's Penn.* 502. *Kip v. Denniston*, 4 *Johns. Rep.* 23. *Shepard v. Little*, 14, *ibid.* 210. *Wilkinson v. Scott*, 17 *Mass. Rep.* 249. *Morse v. Shattuck*, 4 *N. H. Rep.* 229. *Schermerhorn v. Vanderheyden*, 1 *Johns. N. Y. Rep.* 139. *Hawes v. Barker*, 3 *Johns. Rep.* 506. *Maigley v. Hauer*, 7 *ibid.* 341. But a consideration in addition to that stated may be shown.—*Jackson ex dem. Garnsley v. Pike*, 9 *Cowen's N. Y. Rep.* 69.

6. Is not a consideration generally held to be essential to a good and absolute deed?

It is; though a gift or voluntary conveyance will be effectual as between the parties, and is only liable to be questioned in certain cases, when the rights of creditors and subsequent purchasers are concerned.—4 *Kent*, 462.

7. Must not the consideration of a deed be good or valuable?

It must, and not partake of any thing immoral, illegal, or fraudulent. It is a universal rule, that it is unlawful to contract to do that which it is unlawful to do; and every deed and every contract are equally void, whether they be made in violation of a law which is *malum in se*, or only *malum prohibitum*.—*Aubert v. Maze*, 2 *Boss. & Pull.* 391. *Ribbons v. Crickett*, *ibid.* 264. *Watts v. Brooks*, 3 *Ves.* 612. *Bank of the United Seates v. Owens*, 2 *Peters' U. S. Rep.* 567. *Note (d)* 4 *Kent*, 464.

A good consideration is founded upon natural love and affection between near relations by blood; but a *valuable* one is founded on something deemed valuable, as money, goods, services, or marriage. There are some deeds, to the validity of which, a consideration need not have been stated. It was not required at common law, in feoffments, fines, and leases, in consideration of the fealty and homage incident to every such conveyance. The law raised a consideration from the tenure itself, and the solemnity of the act of conveyance. The necessity of a consideration came from the courts of equity, where it was held requisite to raise a use; and when uses were introduced at law, the courts of law adopted the same

idea, and held, that a consideration was necessary to the validity of a deed of bargain and sale.—4 *Kent*, 464.

It has been long the settled law, that a consideration, expressed or proved, was necessary to give effect to a modern conveyance to uses.—*Lloyd v. Spillitt*, 2 *Atk. Rep.* 148. *Jackson v. Alexander*, 3 *Johns. Rep.* 491. *Preston on Abstracts*, vol. iii. 13, 14. *Note (a)* 4 *Kent*, 464–5.

The consideration need not be expressed in the deed, but it must exist. No use will be raised in a covenant to stand seized, or by bargain and sale upon a general consideration, as by the words “for divers good considerations;” but in such cases a sufficient consideration may be averred.—*Mildmay's Case*, 1 *Co.* 175, *a.* *Stevens v. Griffith*, 3 *Vermont Rep.* 488. *Note (b)* 4 *Kent*, 465.

It is sufficient if the deed purports to be for money received or value received, without mentioning the certainty of the sum; and if any sum is mentioned, the smallest in amount or value will be sufficient to raise the use.—*Fisher v. Smith*, *Moore's Rep.* 569. *Jackson v. Schoonmaker*, 2 *Johns. Rep.* 230. *Johnson v. Alexander*, 3 *Ibid.* 491. *Cheney v. Watkins*, 1 *Harr. & Johns. Rep.* 527. *Note (c)* 4 *Kent*, 465.

8. Has not the consideration in a deed become a matter of form, in respect to the validity of the deed in the first instance, in a court of law?

It has, and if the deed be brought in question, the consideration may be averred in pleading, and supported by proof.—4 *Kent*, 465–6. If a consideration be expressed in a deed, the grantor is estopped, and cannot be permitted to aver against it, unless there be fraud or illegality in it, and then he may show it.—*Collins v. Blantern*, 2 *Wils.* 347. *Paxton v. Popham*, 6 *East*, 208. *Note (a)* 4 *Kent*, 465–6.

9. May not the consideration be subjoined to the deed?

It may, and need not be inserted in the body.—*Hartley v. M'Nulty*, 4 *Yeates' Penn. Rep.* 95.

OF THE DESCRIPTION IN A DEED.

1. What is the rule in the description of the land conveyed, respecting known and fixed monuments?

The rule is, that known and fixed monuments control courses and distances. So the certainty of metes and bounds will include and pass all the lands within them, though they vary from the given quantity expressed in the deed. The least certain and material parts of the description, must yield to those which are the most certain and material, if they cannot be reconciled; though in construing deeds, the courts will give effect to every part of the description, if practicable.

Where natural and ascertained objects are wanting, and the course and distance cannot be reconciled, the one or the other may be preferred according to circumstances.—4 *Kent*, 466.

2. How will the line be run, if there be nothing to control the distance?

By the needle.—*Jackson v. Statts*, 2 *Johns. Cas.* 350. *Trammel v. Nelson*, 2 *Harr. & McHenry*, 4. *Pernam v. Weed*, 6 *Mass. Rep.* 131. *McIver v. Walker*, 9 *Cranch's Rep.* 173. *Preston v. Bowmar*, 6 *Wheat. Rep.* 580. *Colclough v. Richardson*, 1 *McCord's Rep.* 167. *Walsh v. Phillips*, *ibid.*, 215. *Brooks v. Tyler*, 2 *Vermont Rep.* 348. *Note (a)* 4 *Kent*, 467.

3. Is not the mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other known specifications, but matter of description?

That is all, and it does not amount to any covenant, or afford ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount.—*Mann v. Pearson*, 2 *Johns. Rep.* 27. *Smith v. Evans*, 6 *Binney's Rep.* 102. *Powell v. Clarke*, 5 *Mass. Rep.* 355. *And see* 1 *Aiken's Rep.* 325, to the same point. *Jackson v. Moore*, 6 *Cowen's Rep.* 706. *Allison v. Allison*, 1 *Yerger's Tenn. Rep.* 16. *Note (b)* 4 *Kent*, 467.

4. May not a general description be enlarged or diminished by a particular description?

It may.—*Crosby v. Parker*, 4 *Mass. Rep.* 110. *Lunt v. Holland*, 14 *Ibid.* 149. *Mann v. Pearson*, 2 *Johns. N. Y. Rep.* 37. *Craig v. Wilkinson*, 19 *Johns. Rep.* 446. *Loomis v. McNaughten*, *Ibid.*, 446.—*Treasurers of the State v. Lang et al.* 2 *Bailey's Rep.*, 430. *Tenny v. Beard*, 5 *N. H. Rep.* 58. *Haw v. Bass*, 2 *Mass. Rep.* 380. *Powell v. Clarke*, 6 *Ibid.* 355. *Pearnham v. Weed*, 6 *Ibid.*, 131.

5. Is not a general description of "all and singular the real estate belonging to the said, &c.," sufficiently certain?

It is, but not where the party is interested with others and the interest is not stated.—*Jackson v. Delaney*, 11 *Johns. Rep.* 36. *Havens et al. v. Richardson*, 5 *New Hamp. Rep.* 113. *Jackson ex Dem. v. Delancy*, 13 *Johns. Rep.* 537. *Jackson ex Dem. Carman et al. v. Roosevelt*, 13 *Johns. N. Y. Rep.* 97.

6. If the description of a deed be sufficiently certain, will a mistake in referring to the original title affect it?

It will not.—*Worthington et al. v. Hyler et al.*, 4 *Mass. Rep.* 106. *Drinkwater v. Sawyer*, 7 *Greenleaf's Me. Rep.* 366.

7. Where there are two descriptions of land, one by name and the other by metes and bounds, which description will be regarded?

That which is most beneficial to the grantee.—*Hawkins v. Hanson*, 1 *Harr. & McHenry's Rep.* 523. *Hall v. Gittings*, 2 *Har. & Johns. Md. Rep.* 112.

8. Whenever it appears by the definite boundaries, or by words of qualification, as "more or less," or as "containing by estimation," or the like, that the statement of the quantity of acres in the deed, is mere matter of description, and not of the essence of the contract, does not the buyer take the risk of the quantity?

He does, if there be no intermixture of fraud in the case.—*Stebbins v. Eddy*, 4 *Mason's Rep.* 414. If the land be sold by certain bounds, or for so much for the entire parcel, or *per aversionem*, in the language of the civilians, as for a field inclosed, or an island in a river, which is a distinct and entire object, any surplus of land over the quantity given, belongs to the vendee.—*Junis v. M'Crummin*, 12 *Martin's Lou. Rep.* 425. *Pothier, Traité de Cont. de Vente*, No. 255. A very great difference (as thirty-three per. cent., for instance) between the actual and the estimated quantity of acres of land, sold in the gross, would entitle a party to relief in chancery on the ground of a gross mistake.—*Quesnel v. Woodlief*, 2 *Hen. & Munf.* 173, n. *Nelson v. Matthews*, 2 *Ibid.* 164. *Harrison v. Talbott*, 2 *Dana's Ky. Rep.* 258. In the latter case, the series of Kentucky decisions on the subject are ably reviewed.—*Note (c.)* 4 *Kent*, 497.

So according to the maxim of Lord Bacon, *falsa demonstratio non nocet*, when the thing itself is certainly described; as in the instance of the farm called A, now in the occupation of B; here the farm is designated correctly as farm A, but the demonstration would be false if C, and not B, was the occupier, and yet it would not invalidate the grant.—*Blague v. Gould*, *Cró. C.* 447, 473. *Jackson v. Clarke*, 7 *Johns. Rep.* 217. *Howel v. Saule*, 5 *Mason's Rep.* 410, note (d.) 4 *Kent*, 467.

OF VOLUNTARY DEEDS.

1. Is not a voluntary deed made by a person not indebted, and without fraudulent intent, valid against creditors?

It is.—*Sexton v. Wheaton*, 8 *Wheat.* 229. *Hind's Lessee v. Longworth*, 11 *Wheat.* 199. *Benton v. Jones*, 8 *Conn. Rep.* 186. *Howe v. Ward*, 4 *Greenleaf*, 195. *Parker v. Proctor*, 9 *Mass. Rep.* 390.

2. Is not a voluntary deed good between the parties?

It is.—*Jackson v. King*, 4 *Cowen's Rep.* 207. 16 *Johns. Rep.* 189.

3. Will the cancellation of a deed divest property which has once vested by transmutation of possession?

It will not.—*Marshall v. Fisk*, 6 *Mass. Rep.* 32. *Bottsford v. Morehouse*, 4 *Conn. Rep.* 550. *Holebrook v. Tirrell*, 9 *Pick. Mass. Rep.* 105. *Hatch v. Hatch*, *ibid.* 311. *Dando v. Tremper*, 2 *Johns. N. Y. Rep.* 87. *Lewis v. Payne*, 8 *Cowen's N. Y. Rep.* 75.

OF THE PROOF OF A DEED.

1. Must not the patent be produced, to prove a grant from the proprietors?

It must.—*Corkey v. Smith*, 3 Harr. & Johns. Md. Rep. 20.

2. Where there has been possession under a void deed, may it not be read in evidence, as to the extent of the claim?

It may, but not to prove the title.—*Robinson v. Sweet et al.*, 3 Greenleaf's Me. Rep. 316. *Little v. Maguire*, 2 Greenl. R. 276. *Middleton v. Mass.* 2 Nott & McCord's S. Car. Rep. 55.

3. Is not the grantor in a deed a good witness to invalidate it?

He is.—*Knight v. Packard*, 3 McCord's Rep. 71. *McFerren et al. v. Powers et al.*, 1 S. & R. Penn. Rep. 102. *Baring, Ass. of Cuttin v. Shippin*, 2 Binney's Rep. 165. *Simons v. Parsons*, 1 Bailey's S. Car. Rep. 62.

4. May not a deed thirty years old be read without proof?

It may.—*Thompson v. Bullock*, 1 Bay's S. Ca. R. 64. *Waldron v. Tuttle*, 4 N. Hamp. Rep. 370. *Jackson v. Blansham*, 3 Johns. N. Y. Rep. 292.

5. Can the effects of a deed read in evidence be limited by the declaration of the party reading it?

No.—*Phillips v. Green*, 5 Monroe's Ky. Rep. 344.

What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of it.

It is perfectly immaterial whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.—*Elliott et al. v. Piersol et al.*, 1 Peters' U. S. Rep. 340.

6. Is not proof of the hand-writing of a deed, added to its being in the possession of the grantee, *prima facie* evidence that it was sealed and delivered?

It is.—*Lessee of Sicard v. Davis*, 6 Peters' U. S. Rep. 124.

7. Is not the evidence to establish the contents of a lost deed, the same as that required in the case of a lost bond?

It is.—*Ibid.*

8. Is positive proof of the handwriting to be expected, where the deed is lost ?

It is not ; the grantee must depend on other proof.—*Ibid.*

9. Has not the court a special limited jurisdiction, in the probate of deeds ?

It has, and the record should state facts which show its jurisdiction in the particular case.—*Ross v. M' Lung*, 6 *Peters' U. S. Rep.* 283.

10. Can a deed of absolute conveyance of land be avoided or controlled by parol evidence of usury, condition, or trust, not expressed in the deed ?

It cannot.—*Christine v. Whitehill*, 16 *Serg. & Rawle's Penn. Rep.* 98. *Flint v. Shelden*, 13 *Mass. Rep.* 443. *Stackpole v. Arnold*, 11 *Ibid.*, 27. *Bartlett v. Dalpratt et al.* 4 *Ibid.*, 702.

11. Can the declaration of the grantor that he never made such a deed, be given in evidence ?

It cannot.—*Buchanan's Lessee v. Stewart*, 3 *H. & J.* 329. *Barilett v. Dalpratt et al.* 4 *Mass. Rep.* 702. *Beach v. Catlin*, 4 *Day's Cas.* 284. *Hand v. Hoffman*, 3 *Halst.* 71.

12. Is not parol evidence admissible to explain a latent ambiguity in a deed ?

It is.—*Hammond v. Ridgley*, 5 *Har. & M'Henry's Ma. Rep.* 245. *Collins v. Leamasters et al.* 2 *Bailey's Rep.* 141.

OF DEEDS AFFECTED BY FRAUDS AND ALTERATIONS.

1. Is not a deed indemnifying the sheriff for a failure to return an execution void ?

It is.—*Kemper v. Kemper et al.* 3 *Rand. Va. Rep.* 8.

2. May not a deed obtained by duress be avoided by entry ?

It may.—*Worcester v. Eaton*, 13 *Mass. Rep.* 371. *Edwards v. Hardley*, *Hard. Rep.* 602.

3. Must not the erasure and alteration be proved to have been made after the execution in order to be of any avail ?

It must.—*Wicks v. Caulk*, 5 *Har. & Johns. Ma. Rep.* 36.

4. What is the general presumption in case of an erasure or alteration of a deed that it was made previous or after the execution ?

The presumption is, it was made after the execution.—*Heffelfinger v. Shultz et al.* 16 *Serg. & Rawle's Penn. Rep.* 46.

5. Is it a question for the court or for the jury whether erasures and alterations in a deed, are material or not?

It is a question for the court.—*Steele's Lessee v. Spencer et al.* 1 *Pet. U. S. C. C. Rep.* 552.

6. Is not a material alteration made while the grantee is in possession presumed to be fraudulent and made by the grantee himself?

It is.—*Chesley v. Frost*, *N. H. Rep.* 145. *Martindale v. Fallet*, *Id.* 92. *Homer v. Wallace*, 11 *Mass.* 309.

7. Is the word "junior," any part of a name?

It is not, and adding it after the deed is executed by the consent of the parties does not avoid it.—*Coit v. Starkweather*, 8 *Conn. Rep.* 289.

8. If a stranger tears the seal from a deed will it invalidate it?

It will not.—*Rees v. Overbaugh*, 6 *Cowen*, 746.

9. Is it for the court or for the jury to determine whether a deed was altered or not?

It is a fact for the jury to determine.—*Heffelfinger v. Shultz et al.* 16 *S. & R. Penn. Rep.* 44.

10. Is it not a question of fact for the jury, whether a deed is void or not?

It is.—*Seward v. Jackson*, 8 *Cowen*, 406. *Jackson v. Peck*, 4 *Wend.* 303. *Jackson ex dem. v. Timmerman*, 7 *Wend. Rep.* 436.

11. Is it not a question for the court, whether alterations and erasures in a deed are material or not?

It is.—*Steele's Lessee v. Spencer et al.* 1 *Pet. U. S. C. C. Rep.* 560.

CONSTRUCTION OF DEEDS.

1. Must not a deed be taken to be executed on the day it bears date?

It must, unless it is made to appear it was executed on another day.—*Colquhoun v. Atkinson*, 6 *Munf. Va. Rep.* 555.

2. Will not a conveyance by metes and bounds, include land under water?

It will.—*Rogers v Jones*, 1 *Wend. N. Y. Rep.* 237.

3. Will not several deeds of the same date, even between different parties, if they relate to the same subject, be construed as one conveyance?

They will.—*Checkering v. Lovejoy et al.* 13 *Mass. Rep.* 51.
Thompson v. M'Clenacan, 16 *Serg. & Rawle's Penn. Rep.* 110.

4. Is not he, who is entitled to a tract of land, and is in possession of part, considered in the possession of the whole?

He is.—*Hammond v. Ridgely*, 5 *Har. & Johns. Md. Rep.* 245.

5. Does a sheriff's deed pass the estate?

It does not, it is vested in the vendee by operation of law.—*Boring's Lessee v. Lemmon*, 5 *Har. & Johns. Md. Rep.* 223. *Boring's Lessee v. Singery*, 4 *Har. & M'Henry's Rep.* 398.

6. Is not effect to be given to every part of a deed?

It is, if possible.—*Jackson v. Loomis*, 18 *Johns. N. Y. Rep.* p. 81.
Jackson ex dem. Erwin v. Moore, 6 *Cowen's N. Y. Rep.* 706. *Jackson v. Clarke*, 7 *Johns. N. Y. Rep.* 217.

7. Must not a deed be pleaded with a profert?

It must.—*Chesley v. Frost*, 1 *New Hamp. Rep.* 145.

8. Will not some things pass by the conveyance of land as incidents appendant or appurtenant thereto?

The answer to this question may be found in 4 *Kent on American Law*, page 467. See also nine following pages, together with the notes added, particularly note (a) 471. Note (b) 472, 473.

9. What does the buyer on a breach of covenant of seisin, recover back?

He recovers back the consideration money and interest, and no more.

The interest is to countervail the claim for *mesne* profits, to which the grantee is liable, and is, and ought to be, commensurate in point of time with the legal claim to *mesne* profits. The grantor has no concerns with the subsequent rise or fall of the land by accidental circumstances, or with the beneficial improvements made by the purchaser, who cannot recover any damages, either for the improvement or the increased value.—4 *Kent*, 475. This appears to be the general rule in this country.—*Staats v. Ten Eyck*, 3 *Caines' Rep.* 111. *Pitcher v. Livingston*, 4 *Johnson's Rep.* 1. *Bennett v. Jenkins*, 13 *Ibid.* 50. *Marston v. Hobbs*, 2 *Mass. Rep.* 433. *Caswell v. Wendell*, 4 *Ibid.* 108. *Bender v. Fromberger*, 4 *Dal. Rep.* 441. *Wilson v. Forbes*, 2 *Dev. N. C. Rep.* 30, see note (b.) Note (a) 4 *Kent*, 476. But on the covenant of warranty, the measure of damage, in Massachusetts, is the value of the land at the time of eviction.—*Gore v. Brazier*, 3 *Mass. Rep.* 523. *Parker, J., in Caswell v. Wendell*, 4 *Ibid.* 108. *Bigelow v. Jones, Ibid.* 512. This was formerly the rule also in South Carolina.—*Liber v. Parsons*, 1 *Bay's Rep.* 19. *Guerard v. Rivers, Ibid.* 265. *Witherspoon v. Anderson*, 3 *Dess. Eq. Rep.* 245. But the rule is now settled in South Carolina, according to the English common law doc-

trine.—*Henning v. Withers*, 2 *Tred. Const. Rep.* 584. *Ware v. Weatherenal*, 2 *McCord's Rep.* 413, and *Statute of 1824*. Note (b) 4 *Kent*, 476. This may greatly exceed the value and the price of the land, at the time of the sale; but the rule was adopted in the first settlement of the country, when the value of the land consisted chiefly in the improvements made by the occupant; and if the warranty would not have secured to them the value of those improvements, it would not have been of much benefit to them.—4 *Kent*, 476.

In other states, the measure of damages, on a total failure of title, even on the covenant of warranty, is the value of the land at the execution of the deed; and the evidence of that value is the consideration money, with interest and costs.—*Talbot v. Bedford*, *Cooke's Tenn. Rep.* 447. *Lowther v. The Commonwealth*, 1 *Hen. & Munf.* 202. *Crenshaw v. Smith*, 5 *Munf. Rep.* 415. *Stout v. Jackson*, 2 *Rand. Rep.* 132. *Stewart v. Drake*, 4 *Halstead's Rep.* 139. *Bennet v. Jenkins*, 13 *Johns. Rep.* 50. *Phillips v. Smith*, *N. Car. Law Repository*, 475. The rule in Virginia has been fluctuating. In *Mills v. Bell*, 3 *Call's Rep.* it was the value at the time of the eviction.—*Cox v. Strobe*, 2 *Bibb's Rep.* 272. *Booker v. Bell*, 3 *Ibid.*, 175. In *Nelson v. Mathews*, 2 *Hen. & Munf.* 164, it was the value at the time of the contract; and the discussions and decisions in *Stout v. Jackson*, have settled the rule in that state, that the proper measure of damages is the value of the land at the time of the warranty; and the purchaser does not recover of the vendor the value of his improvements. See also to the S. P. in Virginia *Thralkild v. Fitzhugh*, 2 *Leigh*, 451, the party evicted recovers on his warranty, the purchase money, with interest from the eviction, and the costs and damages thereon. See also, in support of the general rule, *Blackwell v. The Justices of Lawrence Co.* 1 *Blackford's Ind. Rep.* 266, note. *Sheets v. Andrews*, 2 *Ibid.*, 274. *Adminr. of Backus v. McCoy*, 3 *Ohio Rep.* 221. Note (c) 4 *Kent*. 476-7.

10. Does not the court decide upon the construction of deeds?

It does, and is governed by the intent of the parties; and it is the province of the jury to fix the lines and calls, according to the testimony.—*Carrolls et al. v. Lessees of Norwood*, 5 *Har. & Johns. Md. Rep.* 158.

11. Is it not the rule, that deeds shall be construed so as to carry into execution the intention of the parties?

It is.—*Hollingsworth v. Fry*, 4 *Dall. Penn. Rep.* 347.

12. To whom does it belong to construe a deed—to the court or to the jury?

To the court and not to the jury.—*Vincent v. Lessee of Huff*, 8 *Serg. & Rawle's Penn. Rep.* 381.

13. Must not a court construe a deed according to the intentions of the parties, from the words and expressions used?

It must.—*Hammond v. Ridgely's Lessee*, 5 *Har. & Johns. Md. Rep.* 345.

12. When two clauses in a deed are repugnant, is not the latter to be rejected?

It is.—*Cutler v. Tufts*, 3 *Pick. Mass. Rep.* 272. *Sprague v. Snow*, 4 *Pick. Rep.* 54. *Adams v. Frothingham*, 3 *Mass. Rep.* 361. *Worthington v. Hyler*, 4 *Mass. Rep.* 205.

13. Is not the word "convey," equivalent to the word "grant," at common law?

It is, and passes the title, and transfers it also.—*Patterson v. Carneal*, 3 *Marsh. Ky. Rep.* 621. *Young v. Ringoes*, 1 *Monroe's Ky. Rep.* 30.

14. Will not the court lean to construe a deed valid?

It will.—*Jackson v. Dansbaugh*, 1 *Johns. N. Y. Cas.* 91. *Cheney v. Watkins*, 1 *Har. & Johns. Md. Rep.* 527.

15. Is not a deed to be construed, that its various parts may, if possible, be consistent with each other?

It is.—*Allen v. Brazier et al.*, 2 *Bailey's Rep.* 55. *Tyler et al. v. Hammond*, 11 *Pick. Mass. Rep.* 193.

DEFENDANT.

An appeal from, or *supersedes* to an order quashing an execution against two defendants, need not, if one of them die, be revived against his representatives, but should be proceeded on as to the other only.—*Bullit's Exrs. v. Winstones*, 1 *Munford's Rep.* 269.

1. May a defendant, against whom an execution issued, move to quash it?

He may, though it be not levied on his property, but on that of a co defendant only.—*Ibid*, note to page 284.

DEFICIENCY.

Though land be sold in gross, for so much, be it more or less; yet if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a court of equity will give relief for deficiency.—*Hall v. Cunningham's Exrs.* 1 *Munford's Rep.* 330.

1. In case of a deficiency in lands sold, is the value of the time of the contract the measure of compensation?

It is, of which value the purchase money is the standard, where it does not appear that the actual value was different.—*Humphrey's Admr. v. McKlenchain's Admr. & Heirs, Ibid, 500.*

DEMURRER.

1. What is a demurrer defined to be ?

It has been defined to be, that the party demurring, "will go no further," because the other has not shown sufficient matter against him.—1 *Chitty on Pleadings*, 638. *Leaves v. Bernard*, 5 *Mod.* 182. In other words, however, a demurrer admits the facts, and refers the law arising thereon, to the judgment of this court.—*Co. Litt.* 71 *b.* A demurrer is a plea : 1 *Ld. Raym.* 22.

Mr. Justice Blackstone says in his Commentaries, *b.* 3, *c.* 21, *p.* 314, 315, that a demurrer confesses the facts to be true, as stated by the opposite party ; but denies that, by the law arising upon those facts, any injury is done to the plaintiff.

A demurrer in pleading, said Mr. Justice Gantt, in the case of "*Treasurer of the State v. Wiggins*, 1 *M'Cord's S. Ca. Rep.* 568," is an admission by the adverse party, of the fact charged in the count or declaration, plea, replication, &c. But refers the law arising on such fact, to the judgment of the court ; and on a general demurrer, judgment is to be given, as the right shall appear, without regard to any imperfection as to the form of pleading. And Mr. Justice Ford said, a demurrer admits all such facts as are sufficiently pleaded to be true ; *Bac. Abr. Pleas*, No. 3, but is no admission of such as are not sufficiently pleaded.—*Neale v. Clautice*, 7 *Har. & Johns. Rep.* 372. *Cox v. Gulick*, 5 *Halst. N. J. R.* 329. *Gibson v. Todd*, 1 *Rawle's Penn. Rep.* 456. *M'Cullugh v. Gowan*, *Const. Rep. Tread., Ed.* 516.

2. How are demurrers divided ?

Into either *general* or *special* ; *general*, when no particular cause is alleged ; *special*, when the particular imperfection is pointed out, and insisted upon, as the ground of demurrer ; the former will suffice when the pleading is defective in substance, and the latter is requisite where the objection is only to the form of pleading.—*Ibid.*

General, when the pleading is defective in substance ; and the latter is requisite, when the objection is only to the form of pleading.—*Bac. Abr. tit. Pleas*, N. 5. *Co. Litt.* 72, *a.* 1 *Chitty Plead.*, 4th edit. 574. *Tidd's Prac.*, 8th edit. 750.

A demurrer is either *to the whole* or *a part of a declaration* ; and if there be several counts, or in covenant several breaches, some of which are sufficient and the others not, the defendant should only demur to the latter, for if he were to demur to the whole declaration, the court will give judgment against him. Where there is a demurrer to the whole declaration, but one count is good, the demurrer must fail.—*Tucker v. Randall*, 2 *Mass. Rep.* 283. *The People v. Bariow*, 6 *Cowen's*, 291. *Martin v.*

Strum, 5 *Rand. Va. Rep.* 693. *Roe v. Crutchfield*, 1 *Hen. & Munf. R.* 361. *Moor v. Dewees*, 6 *Litt. Ky. Rep.* 227. *M'Coy v. Hill*, 2 *Litt.*, p. 374. *Whitney v. Crosby*, 3 *Caines' N.Y. Rep.* 89. *Gidney v. Blake*, 11 *Johns. Rep.* 54. *Martin v. Williams*, 13 *Johns. Rep.* 294. *Monell v. Colden*, 13 *Ibid.* 395. *Adams v. Willaughby*, 6 *Ibid.* 65.

In general a party cannot demur, unless the objection appear on the face of the preceding pleadings; but in some cases, where the plaintiff in his declaration partially states a deed which is defective, or contains matter disqualifying the part stated, the defendant may crave oyer of the deed and set forth the whole, thereby making it part of the declaration, and then demur either in respect of the defect in the deed, or the improper manner in which the plaintiff has stated it; and this is the proper course when upon oyer it would appear that a bailment is defective.—*Chitty on Pleadings*, 643.

3. Has it not been decided that a defendant cannot demur in abatement?

It has; for if he does, the court will give final judgment against him, and not merely judgment of *respondeat ouster*.—1 *Salk.* 220. 6 *Mod.* 195, 198. *Bac. Abr. Abatement, P.* And where the defendant demurred to the replication, and concluded his demurrer in abatement, it was holden to be a discontinuance of the whole action.—1 *Salk.* 4. *Archbold's Pl.* 312.

4. May not the defendant demur generally, if a declaration does not state a good cause of action?

He may, for it is a defect in substance.—*Hob.* 304. As if a contract declared on, appear from the declaration to be illegal, and consequently void, the defendant may demur generally, because no cause of action appears.—*Wills.* 339. And if the action be upon a bond, the illegal consideration for which appears in the condition only, if the plaintiff declare on it as a common money bond, the defendant may set out the condition on oyer, and demur generally; and the same in all cases, where the condition of the bond, if set out in the declaration, would show that the plaintiff had no cause of action. But if the action be on a recognizance, and the declaration do not state the condition, the defendant cannot demur; for *non constat*, but the recognizance was unconditional; but he should avail himself of the defect, by plea of *nul tiel record*.—*Barnes*, 339.

5. Must not judgment be had against him, on demurrer, who commits the first error in pleading?

It must.—*Griswold v. The National Insurance Company*, 3 *Cow. N. Y. Rep.* 96. *Utica Insurance Company v. Scott*, 8 *Ibid.* 725. *Wyman v. Mitchell*, 1 *Ibid.* 316. *Murdock v. Winter's Admrs.*, 1 *Har. & Gill's Md. R.* 471. *Bane v. M'Mekin*, 4 *Bibb's Ky. Rep.* 27. *Talvande v Cripps*, 3 *M'Cord's S. Ca. Rep.* 147.

But the preceding rule applies only where the pleadings are defective

in substance.—*Sergeant v. Johnson et al.*, 1 *M'Cord's S. Ca. Reports*, 337. *Per Cur.*, *Nott, J.*: The rule that the court will look back through all the proceedings, and give judgment against the party who has been guilty of the first fault in pleading, applies only where the preceding pleadings are defective in substance and not merely in form, and such as would be aided on a general demurrer.—1 *Chitty*, 647.

A demurrer is an answer in law to the bill, though not, in a technical sense, an answer according to the common language of practice.—*The State of New Jersey v. The People of the State of New-York*, 6 *Peters' Rep.* 223.

6. Upon a demurrer to evidence, how is testimony to be taken ?

To be taken most strongly against him who demurs ; and such conclusion as a jury might justifiably draw, the court ought to draw.—*Pawlings et al. v. The United States*, 2 *Cond. Rep.* 92.

7. What is a known rule in relation to a demurrer ?

That it brings all the pleadings before the court, and in consequence of which judgment may be rendered against him who committed the first fault ; or, which will most generally produce the same result, for him who upon the whole record shall appear to be entitled to the judgment.—*The United States v. Guernsey et al.*, *Ibid.* 132.

It is a matter of discretion with a court, whether it will compel a party to join in a demurrer to evidence.—*Young et al. v. Black*, *Ibid.* 607.

8. Ought a demurrer to evidence be allowed where the party demurring refuses to admit the facts which the other side attempts to prove ?

It ought not ; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions.—*Ibid.*

DEVASTAVIT.

1. How must devastavit be established ?

By means of a second suit (after judgment against an executor or administrator as such), before an action can be maintained on the administration bond.—*Gordon's Admrs. v. The Justice of Frederick*.

DEVISE.

1. What only does a devise of land, without words of inheritance, convey ?

But a life estate only, unless controlled by other words in the devise, notwithstanding it may be inferred, if from the whole tenor of the will the testator intended to devise of fee, though there are no words of inher-

itance.—*Beale v. Holmes*, 5 *Har. & Johns. R.* 208, 177. *Justice Story's remarks in 10 Wheat. U. S. R.* 231. *Jackson ex dem. v. Wells*, 9 *Johns. N. Y. Rep.* 221. *Jackson v. Bull*, 10 *Ibid*, 148. *Jackson v. Martin*, 18 *Ibid*, 35. *French v. M'Henry*, 2 *Binns' Penn. R.* 13. *Daverish v. Smith*, 1 *H. & M.* 148. *Cooke v. Holmes*, 11 *Mass. Rep.* 528. *Jackson v. Staats*, 11 *Johns. Rep.* 387. *Sergeant v. Town*, 10 *Mass. Rep.* 301.

2. Can a *feme covert* devise lands?

She cannot.—*Braddish v. Gibbs*, 3 *Johns. N. Y. Ch. R.* 523. *Dublin v. Chadbourn*, 16 *Mass. Rep.* 433. *Marstow v. Norton*, 5 *New Hamp. Rep.* 205. *Picquet v. Swan*, 4 *Mason's U. S. C. C. Rep.* 443.

3. Can an infant under the age of 18, devise his personal estate?

He cannot.—*Williams v. Baker*, 2 *North Car. Law Rep.* 699. The common law has wisely fixed on the age of 21 years, as the earliest period when the human mind has attained sufficient maturity to act with discretion.

4. Is there any particular form required for a will?

There is not.—*Lyles v. Lyles*, 2 *Nott & M'Cord*, 531. *M'Gee & Wife v. M'Cants*, 1 *Ibid*, 517. *White v. Holmes*, *Ibid*, 430.

5. Does not a devise of wild uncultivated land carry a fee without words of inheritance?

It does.—*Sergeant v. Town*, 10 *Mass. Rep.* 303.

6. What is the leading object in the construction of all wills?

It is to ascertain the intent of the testator, as discovered in the will itself; and for the purpose of thus ascertaining the intent of the testator, it is proper to consider, first, the terms of the particular bequest, construed according to their mutual and obvious meaning and conformably to established rules of law. Secondly, all other parts of the same will; and thirdly, the situation and circumstances of the testator, and the subject matter of the bequest.—*Findlay v. Riddle*, 2 *Binn. Penn. Rep.* 150. *Lamb v. Lamb*, *Ibid*, 371. *Land et al. v. Otley*, 4 *Rand. Va. Rep.* 213. *Ruston v. Ruston*, 2 *Dall's Penn. Rep.* 244.

7. May not the court supply omitted words in a will to carry into execution the intent of the testator?

It may, and the situation of the parties may be taken into consideration.—*Seldon v. King*, 2 *Call's Virginia Rep.* 61. *Lynch & Wife v. Hill & Wife*, 6 *Munf. Va. Rep.* 114. *Smith v. Bell*, 6 *Pet. U. S. C. C. Rep.* 68.

8. Can mere intention prevail against a settled rule of interpretation?

It cannot.—*Dashiell v. Dashiell*, 2 Har. & Gill, 127. *Hill v. Burrow*, 3 Call's Va. Rep. 297. *Drury v. Negro Grace*, 2 Har. & Johns. 356.

9. Must not the whole will be taken together ?

It must, and the latter words will qualify the preceding.—*Smith v. Bell*, 6 Peters' U. S. C. C. Rep. 68.

10. Will not an estate in preamble be incorporated in the devise and pass the fee ?

It will.—*Johnson v. Johnson's Widow*, 1 Munf. Rep. 549. *Phillips et ux. v. Nelson et al.*, 3 Munf. Rep. 75. *Tate v. Tally*, 3 Call's Rep. 307. *Kennon v. McRoberts*, 1 Wash. U. S. C. C. Rep. 96. *Davis v. Miller*, 1 Call's Rep. 127. *Wyatt v. Sadler's Heirs*, 1 Munf. Virginia Rep. 537.

11. May not words be borrowed from the preamble, and carried to a devising clause to enlarge a life estate into a fee ?

They may ; but they will not of themselves enlarge an estate.—*Davies v. Miller*, 1 Call, 110. *Watson v. Powel*, 3 Call, 265. *Kennon v. M'Roberts*, 280. *Sydnor v. Sydnor*, 2 Munf. 263. *Wright v. Denn*, 10 Wheat. Rep. 204. *Seel v. Thompson*, 14 Serg. & R. 84. *Beall & Holmes*, 4 H. & J. 209.

12. May not the word *heir* be a *nomen collectivum* and operate as the word *heirs* ?

It may.—*Hall v. Vandegrist*, 2 Binn. Penn. Rep. 374.

13. Will not the word *estate* carry a fee ?

It will.—*Jackson v. Delancy*, 11 Johns. Rep. 365. *S. C. in Error*, 13 *Ibid*, 537. *Archer v. Denale et al.* 1 Peters' U. S. C. C. Rep. 585. *Beale's Lessee v. Holmes*, 6 Har. & Johns. Md. Rep. 208.

14. Will not the words "all I possess in-doors and out-doors," carry a fee ?

They will.—*Tolar v. Tolar et al.* Hawk's N. Ca. Rep. 74.

15. Does not a devise in these words, "I will all my landed property in N, to A F," carry a fee ?

It does.—*Fogg v. Clark et al.* N. H. Rep. 163.

16. May not the word *appurtenances*, in a devise, have a more extended signification than in a deed ?

It may.—*Grant v. Chase*, 17 Mass. Reports, 447. *Otis v. Smith*, 9 Pickg. Mass. Rep. 293. *Jackson v. White* 8 Johns. N. Y. Rep. 47.

17. May not a fee be implied without words of inheritance?

It may.—*Hall v. Godwin*, 2 *Nott & M'Cord's Rep.* 383. *Scanlan v. Porter*, 1 *Bailey's Rep.* 421. *Dunlap v. Crawford*, 2 *M'Cord's S. Ca. Rep.* 171. 4 *Ibid.* 422.

18. Does not a general devise with payment of debts, carry the fee?

It does, if the charge be personal.—*Wright v. Dee*, 10 *Wheat.* 406. *Lessee of Fergusson v. Zepp*, 4 *Wash. U. S. Rep.* 644.

19. Do the words "residue and remainder," enlarge an estate?

They do not of themselves.—*Lessee of Fergusson v. Zepp*, 4 *Wash. U. S. C. C. Rep.* 645. *Moore v. Miller*, 2 *B. & P.* 247. *Palmer v. Richards*, 3 *T. R.* 356. *Norton v. Ladd*, 1 *Lutw.* 755.

20. Will not the words which convey an estate tail in land, vest an absolute property in chattels?

They will.—*Exrs. of Moffat v. Strong*, 10 *Johns. N. Y. Rep.* 11. *Patterson v. Ellis*, 11 *Wendell's N. Y. Rep.* 259. *Per Cur. Kent, Ch. J.* The general principle is, that where there is an express limitation of a chattel, by words which if applied to a freehold would create an estate tail, the whole interest vests absolutely in the first taker, and a limitation over is too remote. And the court, *Savage, Ch. J.*, said the rule is the same, whether the estate tail is created by express words or by implication.—*Patterson v. Ellis*, 11 *Wend. N. Y. Rep.* 259.

21. Does the right of survivorship exist in Ohio between husband and wife?

It does not.—*Sergeant v. Steinberger et al.*, 2 *Ham.* 307. *Ohio Cond. Rep.* 372.

22. Is drunkenness a legal exception to the validity of the will?

It is not merely of itself, unless it absolutely disables the party from disposing of his estate with intelligence and reason; but where by habitual intoxication a man's senses are besotted, and his understanding gone, he can make no will. But the presumption is in favor of mental capacity, and he who alleges the contrary for the purpose of invalidating a deed, or a will, must prove it.—*Starrett v. Douglass*, 2 *Yeates' Pennsylv. Rep.* 48. *Turner v. Turner*, 1 *Little's Ky. Rep.* 102. *Hodge v. Fisher*, 1 *Peters' U. S. C. C. Rep.* 163. *Kinlach v. Palmer*, 1 *Rep. Const. Ct.* 225.

23. Does not a subsequent marriage and birth of a child amount to an implied revocation of a will?

It does.—*Brush v. Wilkins*, 4 *Johns. N. Y. Chan. Rep.* 506. *Per Cur. Kent, Chancellor.* It had become a settled rule of law, as early as 1775, that a subsequent marriage and birth of a child, did amount to an

implied revocation of a will, and his Honor referred to *Lugg v. Lugg*, 1 *Ld. Raymond*, 441. *Sheppard v. Sheppard*, 5, *T. R.* 51, *note*. *Parson v. Lanoe*, 1 *Vesey*, 189. *Jackson v. Hurlock*, 2 *Eden*, 262. *Christopher v. Christopher*, *Dick. Rep.* 445. *Brady v. Cubit*, *Doug.* 31. *Doe v. Lancashire*, 5 *T. R.* 49. *Gibbons v. Count*, 4 *Vesey*, 848.

DEVISE—EXECUTORY.

1. What is an executory devise ?

It is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation, of contingent estates in conveyances at law. If the limitation by will does not depart from those rules prescribed for the government of contingent remainders, it is, in that case, a contingent remainder, and not an executory devise.—4 *Kent*, 263. *Carwardaine v. Carwardaine*, 1 *Eden's Rep.* 27. Lord Kenyon observed, in *Doe v. Morgan*, 3 *Term Rep.* 763, that the rule laid down by Lord Hale, had uniformly prevailed without exception, that "Where a contingency was limited to depend on an estate of freehold, which was capable of supporting a remainder, it should never be construed to be an executory devise, but a contingent remainder."—4 *Kent*, 263.

2. For what reason were executory devises instituted ?

In order to support the will of the testator ; for when it was evident that he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise. They are not mere possibilities, but certain and substantial interests and estates, and are put under such restraints only, as have been deemed requisite to prevent the mischiefs of perpetuities, or the existence of estates that were unalienable.—4 *Kent*, 264. *Ld. Ch. J. Willes, in Goodtitle v. Wood*, *Wille's Rep.* 208.

The history of executory devises presents an interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirit of the courts of justice to uphold that policy, and keep property free from the fetters of entailments, under whatever modification or form they might assume. Perpetuities, as applied to real estate, were conducive to the power and grandeur of ancient families, and gratifying to the pride of the aristocracy ; but they were extremely disrelished by the nation at large, as being inconsistent with the free and unfettered enjoyment of property. "The reluctant spirit of English liberty," said Lord Northampton, "would not submit to the statute of entails ; and Westminster Hall, siding with liberty, found means to evade it." Common recoveries were introduced to bar estates tail : and then, on the other hand, provisos and conditions not to alien with a cesser of the estate on any such attempt by the tenant, were introduced to recall perpetuities. The courts of law would not allow any such restraints by condition upon the power of alienation, to be valid.

Such perpetuities, said Lord Bacon, would bring into use the former inconveniences attached to entails ; and he suggested that it was better for

the sovereign and the subject, that men should be "in hazard of having their houses undone by unthrifty posterity, than to be tied to the stake by such perpetuities."—4 *Kent*, 264. *Duke of Marlborough v. Earl Godolphin*, 1 *Eden's Rep.* 417. *Use of the Law, in Bacon's Law Tracts*, 145. Executory limitations were next resorted to, that men might attain the same object.

Mr. Hargrave has gleaned from the oldest authorities a few imperfect samples of an executory devise; but this species of limitation may be considered as having arisen since the statute of uses and of wills; it was slowly and cautiously admitted, prior to the leading case of *Pells v. Browne*, *Cro. Jac.* 590. See *Mr. Hargrave's* elaborate argument as counsel in the great cause of *Thelluson v. Woodford*, 4 *Ves.* 249—464.

Lord C. J. Bridgman, in the case of *Beat v. Amherst*, (*T. Raym.* 92,) had, however, long preceded him in the research; for he insists, in that case, that executory devises were grounded upon the common law, and he refers to 49 *Edward III.*, 16 *a*, and *Henry VI.*, 13 *a*, as evidence of it. Both of these cases are cited by *Lord Coke*, and the latter in 7 *Co.* 9, *a*. to prove that an infant *in ventre de sa mere*, was, in many cases, "of consideration in the law,"—*Cro. Jac.* 590. 4 *Kent*, 264, 265.

3. How many kinds of executory devises are there relative to real estates?

Two; and a third sort relative to personal estates.—4 *Kent*, 268. 1st. Where the devisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate to that contingency. Thus, if there be a devise to A for life, remainder to B in fee, provided that if C should, within three months after the death of A, pay one thousand dollars to B, then to C in fee, this is an executory devise to C, and if he dies in the lifetime of A, his heirs may perform the condition.—*Marks v. Marks*, 10 *Mod. Rep.* 419. *Prec. in Chan.* 486. 2d. Where the testator gives a future interest to arise upon a contingency, but does not part with the fee in the mean time, as in the case of a devise to the heirs of B, after the death of B, or a devise to B in fee, to take effect six months after the testator's death, or a devise to the daughter of B, who shall marry C within fifteen years.—*Bates v. Amherst*, *T. Raym.* 82. *Lent v. Archer*, 1 *Salk. Rep.* 226. *Lord Ch. J. Treby*, in *Clarke v. Smith*, 1 *Lutw.* 798. As to the 3d sort, relative to personal estates, this is the classification made by *Powell, J.*, in *Scatterwood v. Edge*, 1 *Salk. Rep.* 229, and it has been followed by *Mr. Fearn*. *Mr. Preston* goes on to a greater subdivision, and he says there are six sorts of executory devises applicable to freehold interests, and two, at least, if not three sorts of executory bequests applicable to chattel interests.—*Preston on Abstracts of Title*, Vol II., 124. I have chosen not to perplex the subject by divisions too refined and minute. The object in elementary discussions, according to the plan of these lectures, is to generalize as much as possible.—2 *Kent*, *Lect.* 35, § 5, and note (a.) 4 *Kent*, 269.

4. In what three very material points does an executory devise differ from a remainder?

1st. It needs not any particular estate to precede and support it, as in the case of a devise in fee to A, upon his marriage. Here is a freehold limited to commence in *futuro*, which may be done by devise, because the freehold passes without liberty of seisin; and until the contingency happens the fee passes, in the usual course of descent, to the heirs at law.

2d. A fee may be limited after a fee, as in the case of a devise of land to B in fee, and if he dies without issue, or before the age of twenty-one, then to C in fee.

3d. A term for years may be limited over, after a life estate created in the same. At law, the grant of a term to a man for life would have been a total disposition of the whole term.—2 *Black. Com.* 173, 174.

Nor can any executory devise or bequest be prevented or destroyed by any alteration whatsoever, in the estate out of which, or subsequently to which it is limited.—*Pells v. Browne*, *Cro. Jac.* 590. *Fearne on Executory Devises*, 46, 4 *Kent*, 270.

5. May not money be the subject of an executory devise?

It may.—*Scott v. Price*, 2 *Serg. & Rawle's Penn. Rep.* 59.

DISTRESS.

1. May a landlord in person, or by private agent, levy a distress?

He may, but cannot sell the distrained effects, which in such case are only to be held as a pledge, to compel the tenants to pay the rent.—*Smiths v. Ambler*, 1 *Munford's Rep.* 596.

DISTRIBUTION.

1. What is the universal rule governing the distribution of personal property?

That the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death. It is of no consequence what was the country of his birth, or of any former domicile, or what is the actual *situs* of the personal property at the time of his death; it devolves upon those, who are entitled to take it, as heirs or distributees, according to the law of his actual domicile. Hence if a Frenchman dies intestate in America, all his personal property, whether in France or America, is distributable according to the statute of distributions of the state wherein he then resided.—*Story on the Confl. of Laws*, 404, cites *Rodemburg*, *De Div. Stat. P.* 2, tit. 2, ch. 2, p. 59; 2 *Boullenois*, 54. *Erskine, Inst. B.* 3, tit. 9, § 4. *Pipon v. Pipon*, *Ambler, R.* 25. *Thorne v. Watkins*, 2 *Vess. R.* 35. 1 *Chitty on Comm. & Manuf.* 661. *Sill v. Worswick*, 1 *H. Black*, 690, 691. *Bruce v. Bruce*, 2 *Boss. & Pull.* 229, note. *Hunter v. Potts*, 4 *T. R.* 182. *Potter v. Browne*, 5 *East's R.* 130.

Livermore's Dissert. 162, 163. *Oliver v. Townes*, 14 *Martin's R.* 99. *Shultz v. Pulver*, 3 *Paige's R.* 182. *De Sobry v. De Laistre*, 1 *Hor. & Johns. R.* 193, 224, 228. *Holmes v. Remson*, 4 *Johns. Ch. R.* 460. *S. C.* 20 *Johns. R.* 229. *De Couche v. Savatier*, 3 *Johns. Ch. R.* 190. *Erskine's Inst.*, b. 3, tit. 2, § 40, 41. *Id.* b. 3, tit. 9, § 4. 2 *Kaimes' Equity*, b. 3, ch. 8, § 3, 4, p. 333, 345. 1 *Boullenois*, 358. 2 *Id.*, 54, 57. *Fergusson on Mar. & Div.* 346, 361. *Vattel*, b. 2, § 85, 103, 110, 111. 1 *Hertii Opera, De Collis. Leg.*, § 4. n. 26, p. 125. *Herberus*, lib. 1, tit. 3, § 15. *Henry on Foreign Law*, 13, 14, 15. *Id.* 46. 196. *Voet ad Pand.*, lib. 38, tit. 17, § 34, p. 596. *Harvey v. Richards*, 1 *Mason's R.* 418. 2 *Froland, Mem.* 1294. 2 *Dwarris on Statute*, 649.

2. What is the rule in relation to the distribution of real property?

The descent and heirship of real estate is exclusively governed by the law of the country within which it is actually situate. No person can take, except those who are recognized as legitimate heirs by the laws of that country; and they take in the proportions and order which those laws describe.—*Story's Comm. on the Conf. of Laws*, 404. Cites *Doe dem. Birthwhistle v. Vassell*, 5 *B. & Cress.* 438. *U. S. v. Crosby*, 7 *Cranch's R.* 115. *Kerr v. Moon*, 9 *Wheat. R.* 566, 570. *McCormick v. Sullivan*, 10 *Ibid.*, 192. *Darby v. Mayer*, 10 *Ibid.*, 479. *Hosford v. Nicholls*, 1 *Paige's R.* 220. *Butler v. Davenport*, 1 *Pick. R.* 81. *Wells v. Cowper*, 2 *Hamm. R.* 124. 1 *Hertii Opera De Collis. Leg.*, § 4, n. 26, p. 135. 1 *Boullenois*, 25, 223, &c. 1 *Froland, M.* 60, 61, 65. *Voet Le Stat.* § 4, ch. 2, n. 6, p. 123. *Voet ad Pand.*, lib. 1, tit. 4, ¶ 2, § 3, p. 39. *Erks. Inst.*, b. 3, tit. 2, § 40, 41, p. 515. *D'Aguesseau, Œuvres*, tom. 4, p. 637. *Huberus*, lib. 1, tit. 3, § 15. 2 *Dwarris on Stat.* 649. *Rodenburg*, p. 2, tit. 2 ch. 2, p. 59, 63. 2 *Boullenois*, 54, 57, 338. 2 *Froland, Mem.*, ch. 27, p. 1288.

3. How are persons who are to take by some general designation in a will, as heirs, next of kin, issue, children, &c., to be ascertained?

They are to be ascertained by the *lex loci*, in regard to immovable property, and by the *lex domicilii*, in the case of movable property, unless the context furnishes some guide for a different interpretation. The like rule applies to descents and distributions of immovable and movable property.—*Story's Com. on Conf. of Laws*, 406. *Thorne v. Watkins*, 2 *Ves.* 35. *Browne v. Browne*, 3 *Hagg. Ecc. R.* 455, note. *Voet De Stat.*, § 3, ch. 3, n. 2, p. 100.

The profits of an estate of an infant dying intestate, (including the increase of slaves,) accruing to such infant in his or her lifetime, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person or persons inheriting such estate generally.—1 *Munford's Rep.* 183.

In a suit for contribution against legatees or distributees, the executor, administrator, or, if he be dead, the person who succeeded him in the executorship, or administration, ought to be made a party; unless it appear that the accounts of such executorship or administration have been

regularly made up, and the estate thereupon delivered over to the legatees or distributees.—1 *Munford's Rep.* 119.

DIVORCE.

1. How many kinds of divorce are there ?

Two, the one total, the other partial ; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*. The total divorce, *a vinculo matrimonii*, must be for some canonical cause or impediment, and those existing *before* the marriage, as is always the case in consanguinity ; not supervenient, or arising *afterwards*, as may be the case in affinity or corporal imbecility. For, in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*, and the parties are therefore separated *pro salute animarum* ; for which reason no divorce can be obtained but during the life of the parties.—1 *Black. Comm.* 440.

Divorce *a mensa et thoro* is just and lawful *ab initio*, and therefore the law is tender of dissolving it ; but, for some supervenient cause, it becomes improper or impossible for the parties to live together ; as in the case of intolerable ill-temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly, and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law ; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another.—*Matt.* xix. 9. The civil law, which is partly of Pagan origin, allows many causes of absolute divorce, and some of them pretty severe ones ; as if a wife goes to the theatre, or the public games, without the knowledge and consent of the husband.—*Nov.* 117. But among them adultery is the principal, and with reason named the first.—*Cod.* 5, 17, 8.

But in England adultery is only a cause of separation from bed and board,—*Moor*, 683, for which the best reason that can be given is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent, as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties, 2 *Mod.* 314, which is now prohibited by the canons.—*Can.* 1603, c. 105.

A husband, (*note* 23) 1 *Black. Comm.*, by *Hovenden*, 442, cannot obtain a divorce in the ecclesiastical courts for the adultery of his wife, if she recriminates, and can prove that he also has been unfaithful to the marriage vow ; this seems to be founded on the following rational precept of the civil law :

Judex adulterii ante oculos habere debet et inquirere, an maritus pudice vivans, mulieri quoque bonos mores colendi auctor fuerit. Periniquum enim videtur esse, ut pudicitiam vir ab uxore exigit, quam ipse non exhibeat.—*ff.* 48, 5, 13, ch.

However, divorces *a vinculo matrimonii*, for adultery, have of late

years been frequently granted by act of parliament.—1 *Blackstone's Commentaries*, 441.

Chancellor Kent, in his *Commentaries on American Law*, says also, —Neither party can obtain a divorce for adultery, if the other party re-criminates, and can prove a correspondent infidelity.—*Vol. 2, p. 100.*

The following note (24), p. 442, is by *Mr. Hovenden*: Bills for this purpose are very closely investigated in the House of Lords.

It is indispensable that the party making the application for such relief should previously have obtained, in the proper ecclesiastical court, a decree for a divorce *a mensa et thoro*, and it is also generally required, if it be the husband who sues, that he shall have recovered damages, by a verdict at common law, against the adulterer. This last condition may, however, be relaxed, if reasonable grounds are shown. It was so resolved in *Lord Ellenborough's case* (*March, 1830*), where Prince Schwartzburg, the adulterer, being out of the jurisdiction of our courts, no verdict could have been had against him.

2. Where a wife has committed adultery, is not a subsequent cohabitation with her by the husband, a remission of the offence, and a bar to divorce?

If he knew of her guilt it is.—*Smith v. Smith*, 4 *Paige's N. Y. Ch. R.* 435-6. *Hall v. Hall*, 4 *N. Hamp. Rep.* 462. *North v. North*, 5 *Mass. Rep.* 320. *Williamson v. Williamson*, 1 *Johns. N. Y. Ch. Rep.* 488.

3. Will a divorce be granted where both parties are guilty of adultery?

It will not.—*Smith v. Smith*, 4 *Paige, N. Y. Ch. Rep.* 437. *Wood v. Wood*, 2 *Ibid.* 111.

Mr. Walworth, Chancellor, said, if a husband, who seeks to obtain a divorce, on account of the criminal conduct of his wife, has himself been guilty of the same offence, whether before or after the adultery of the wife, it is a conclusive bar to the suit.—*Forster v. Forster*, 1 *Hagg. Cons. Rep.* 144. *Ashley v. Ashley*, 1 *Hagg. Ecc. Rep.* 714. *Poynter's Mar. of Div.* 224. 2 *R. S.* 145. *S.* 42, *Sub.* 4.

4. Are the confessions of a wife, that she has committed adultery, sufficient to justify a divorce?

They are not.—*Washburn v. Washburn*, 5 *N. Hamp. Rep.* 195. *Gould v. Gould*, 2 *Aik. Rep.* 180. 1 *Johns. C. R.* 197. *Betts v. Betts*, 1 *Mass. Rep.* 346. *Baxter v. Baxter*, 1 *Johns. Cas.* 25. *Doe v. Doe*, 2 *Byrne's Eccl. L.* 348. *Holland v. Holland*, 2 *Mass. Rep.* 154.

5. Is not extreme cruelty a sufficient cause of divorce *a mensa et thoro*?

It is; but the mere neglect of the husband to provide for his family is not.

But such cruelty must be without provocation of the wife.—*Warren v. Warren*, 3 *Mass. Rep.* 321. *French v. French*, 4 *Ibid.* 487.

6. Will threats of violence, alone, be a legal cause for divorce ?

Not without actual assault. The wife's remedy in such a case is by exhibiting articles of the peace against her husband.—*Hill v. Hill*, 2 *Mass. Rep.* 150.

7. Is frequent intoxication sufficient excuse for granting a divorce ?

Not always. If, however, the consequences of intoxication are visited upon the wife, or the same is made the foundation of a course of aggression, so as to produce bodily injury, or endanger her personal safety while cohabiting with him, it is then the law interposes in her behalf, and gives to this court its authority to separate the one from the other.—*Mason v. Mason*, 1 *Edwards' N. Y. Ch. Rep.*

8. What does the law allow the wife in case of a divorce *a mensa et thoro* ?

The law allows alimony to the wife : which is that allowance which is made to a woman for her support out of the husband's estate : being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case.

This is sometimes called her *estovers* ; for which, if he refuses payment, there is, besides the ordinary process of excommunication, a writ at common law, *de estovius habendis*, in order to recover it.—1 *Lev.* 6.

It is generally proportioned to the rank and quality of the parties. But in case of elopement, and living with an adulterer, the law allows her no alimony.—1 *Black. Comm.* 442. *Cowl. tit.* "Alimony."

The courts in Massachusetts, Delaware, Ohio, North Carolina, Alabama, and probably in other states, are authorized by statute to grant divorces *causa impotentiae* ; and in Connecticut, imbecility has been adjudged sufficient to dissolve a marriage, on the ground of fraud.—*Benton v. Benton*, 1 *Day's Rep.* 111. *Dane's Abr. of American Law*, Ch. 56, Art. 9, Sec. 14. The canonical disabilities, such as consanguinity and affinity, and corporeal infirmity, existing prior to the marriage, render it voidable only, and such marriages are valid for all civil purposes, unless sentence of nullity be declared in the lifetime of the parties ; and it cannot be declared void for those causes after the death of either party.—1 *Blackstone's Commentary*, 434, 435.

But the civil disabilities, such as prior marriage, want of age, or idiocy, make the contract void *ab initio*, and the union meretricious.—*Elliot v. Gurr*, 3 *Philmore's Rep.* 16. By the *Massachusetts Revised Statutes*, 1835, all marriages prohibited by law on account of consanguinity or affinity, or when the former wife or husband is living, or when either party was at the time insane, or an idiot, or between a white person and a negro, Indian or a mulatto, are declared to be absolutely void, without a decree of divorce, or other legal process ; though, if the case be doubtful in point of fact, a libel for a divorce may be filed and prosecuted.

So, if persons marry under the age of consent, and separate during such nonage, and not cohabit afterwards, the marriage is void, without any decree of divorce. Divorce *a vinculo* may be decreed for adultery or im-

potency in either party, or when either is sentenced to confinement in the state prison.

The issue of any marriage declared null by decree, on account of consanguinity or affinity, or of any marriage between a white person and a negro, Indian or mulatto, are to be deemed illegitimate.

It is otherwise upon the dissolution of a marriage on account of nonage, insanity or idiocy. So the issue is also legitimate if the marriage be dissolved by bigamy, provided the second marriage was contracted in good faith, and with the full belief that the former husband or wife was dead.—*Note (b.) 2 Kent, 96.*

In some of the United States divorces are restrained, even by constitutional provisions, which require to every valid divorce the assent of two-thirds of each branch of the legislature, founded on a previous judicial investigation and decision.—*Georgia, Mississippi, & Alabama. Note (c.) 2 Kent, 105.*

In some of the other states, no divorce is granted, but by a special act of the legislature, according to the English practice; and in two states, the legislature itself is restrained from granting them, but it may confer the power on the courts of justice.—*New Jersey, Maryland, Virginia, S. Carolina & Louisiana.*

In some of these states, divorces by special acts of the legislature are very common. In Missouri, divorces are not to be granted by the legislature, unless the accused party shall have had due notice of the application. Divorces may also be granted by the circuit courts, in cases of extreme cruelty, or conviction of an infamous crime.—*Session, 1832, 3.*

The Congress of the United States, by an act of the 15th May, 1826, *ch. 46*, annulled several acts, passed by the governor and legislative council of the *Territory of Florida*, granting divorces. This is an instance of a strong national condemnation of the practice of granting legislative divorces.—*Note (d.) 2 Kent, 105.*

For more complete information respecting the laws of divorce in different states, &c., see whole of Lect. 27, 2 Kent, 95.

DOWER.

1. When does dower exist?

It exists where a man is seized of an estate of inheritance, and dies in the lifetime of his wife. In that case she is at common law entitled to be endowed, for her natural life, of the third part of all the lands whereof her husband was seized, either in deed or in law, at any time during the coverture, and of which any issue which she might have had, might by possibility have been heir.—*Litt. § 36. Perkins' Lect. 301. N. Y. Revised Statutes, Vol. I., 740, § 1. Park's Treatise on the Law of Dower. 5 Chase's Statutes of Ohio, Vol. II., 1314. 1 Virginia R. C. Mass. R. Statutes of 1835, part 2, tit. 1, c. 60, § 1. Note (e.) 4 Kent's Com., 34, 3d edit.*

2. For what was this humane provision of the common law intended ?

It was intended for the sure and competent sustenance of the widow, and the better nurture and education of her children.—*Bracton*, 92, *a Fleta lib. 5, c. 23, § 2. Co. Litt. 30, b.* In the customs of the ancient Germans, recorded by Tacitus, *De mor. Germ. c. 18. Dotem non uxor marito, sed uxori maritus offert.* In this custom we probably have the origin of the right of dower, which was carried by the northern barbarians into their extensive conquests; and when a permanent interest was acquired in land, the dower of the widow was extended and applied to real estate, from principle and affection, and by the influence of the same generosity of sentiment which first applied it to chattels.—*Stewart's View of Society*, 29, 30, 223–227.

Olaus Magnus records the same custom among the Goths; and Dr. Stuart shows it to have been incorporated into the laws of the Visigoths and Burgundians.

Mr. Barrington observes, that the English would probably borrow such an institution from the Goths and Swedes, rather than from any other northern nations. *Observations upon the Ancient Statutes*, 9, 10. Among the Anglo-Saxons the dower consisted of goods, and there were no footsteps of dower in lands until the Norman conquest.—2 *Blac. Com.*, 129. *Spelman*, *Gloss. voce Doarium*, deduces *dos* from the French *douaire*. And Sir Martin Wright says, that dower was probably brought into England by the Normans, as a branch of their doctrine of *fiefs* or *tenures*.—*Wright on Tenures*, 192. In the French law, tenancy by *courtesy* is called *droit de viduité*.—*Œuvres de D'Aguesseau, Tome IV.*, 360.

We find the law of dower in the mode of endowing *ad altium ecclesiæ* in common use in the time of *Glanville*.—*Glan. lib. 6, c. 1. Note (b.) 4 Kent 36, 3d edit.*; but limited to the third part of the freehold lands which the husband held at the time of the marriage. This limitation is likewise mentioned in *Bracton* and *Fleta*.—*Bracton, lib. 2, c. 39, § 2. Fleta, lib. 5, c. 24, § 7. Note (c.) 4 Kent, 36, 3d ed.* Whereas in *magna carta*, the law of dower, in its modern sense and enlarged extent, as applying to all lands of which the husband was seized *during the coverture*, was clearly defined and firmly established. It has continued unchanged in the English law to the present time; and, with some modifications, it has been everywhere adopted as part of the municipal jurisprudence of the United States.—4 *Kent, 3d edit.*

3. What three things are requisite to the consummation of the title to dower ?

Marriage, seisin of the husband, and his death.—*Co. Litt.*, 31, *a.*

4. Does not dower attach upon all marriages not absolutely void, and existing at the death of the husband ?

It does, and belongs to a wife *de facto*, whose marriage is voidable by decree, as well as to a wife *de jure*. It belongs to a marriage within the age of consent, though the husband dies within that age.—*Co. Litt. 33, a. 7 Co. Kenne's Case. Doct. & Stu.*, 22.

5. Could a *feme covert* who was an alien, be endowed by the common law?

She could not, any more than she could inherit.—*Co Litt.* 31, *b.* *Keely v. Harrison*, 2 *Johns. Cas.* 29.

But this rule has been relaxed in some parts of this country; and in Maryland, an alien widow who married in the United States, and resided here when her husband died, was admitted to dower.—*Buchannan v. Deshon*, 1 *Har. & Gill.* 280. In Mass. R. Statutes of 1835, and in New Jersey by statute in 1799, an alien widow takes dower; and according to the bill as reported by Mr. Scott, the revisor in New Jersey, in 1834, the widow would be entitled to dower in the lands whereof her husband was seized at any time during the coverture, though the issue she might have had could not have inherited the same.—*Note (d.) Kent*, 37, 3d edit.

6. Will not the right of the widow to dower in the lands of which her husband died seized and possessed, be preferred to that of creditors of the husband?

It will.—*Combs v. Young*, 4 *Yerger's Tenn. Rep.* 218. Dower is a claim highly favored in law.—*Griggs v. Smith*, 7 *Halst. Rep.* 22. *Lambert's Treatise on Dower*, 12, 13. *Ramsey v. Dozier*, 1 *S. Ca. Rep.* 112. *Shoemaker v. Walker*, 2 *Serg. & Rawle's Penn. Rep.* 554.

7. Is not the wife of a mortgagor dowable of an equity of redemption?

She is.—*Snow v. Stevens*, 15 *Mass. Rep.* 278. *Gibson v. Crehore*, 3 *Pick. Mass. Rep.* 475. *Walker v. Falley*, 6 *Pick. Rep.* 416. *Bolton v. Ballard*, 13 *Mass. Rep.* 227. *Fish v. Fish*, 1 *Conn. Rep.* 559. *Reed v. Morrison*, 12 *Serg. & Rawle's Penn. Rep.* 18.

8. Is a wife dowable of a trust estate?

She is not.—*Cowman & Glenn v. Hall*, 3 *Gill. & Johns. Md. Rep.* 405, 406. *Milledge et al. v. Lamar et al.*, 4 *Dessauss. S. Ca. Equity Rep.* 638, and the cases there cited. *Dimond v. Billinglea*, 2 *Har. & Gill's Md. Rep.* 273. But it is otherwise in Pennsylvania; in that state the usage has been more reasonable, and more analogous to the general principles of dower: the husband and wife are placed on an equal footing, he has his tenancy by the courtesy, and she has her dower.—*Shoemaker v. Walker*, 2 *Serg. & Rawle's Penn. Rep.* 554. *Reed v. Morrison*, 12 *Serg. & Rawle's Rep.* 21. *Lambert's Treatise on Dower*, 26.

This is said to be the law also in Maryland, Virginia, North Carolina, Illinois, and Alabama; but the rule in those states must be understood to be limited to the case of trusts in which the husband took a beneficial interest. It could not be applied to trust estates in which the husband was seized in fee, of the dry technical title, by way of trust or power, for the sole interest of others.

In Ohio, the wife is dowable of any equitable estate in lands which the husband may hold at the time of his death.—*Smiley v. Wright et al.*, 2 *Hammond*, 500. *Ohio Cond. Rep.* 446.

9. Is a widow entitled to dower in lands which were wild when aliened by the husband, but had been brought into a state of cultivation by the husband's grantee, at the time when the dower was demanded?

She is not.—*Webb v. Townsend*, 1 *Pick. Mass. Rep.* 21. *Connor v. Shepard*, 15 *Mass. Rep.* 164. *Johnson v. Pearley*, 2 *N. Hamp. Rep.* 56. 3 *Kent*, 43, 3d edit. But the widow is dowable of a lot of wild land which was used by her husband in connection with the dwelling-house and cultivated land.—*White v. Willis*, 7 *Pickg. Rep.* 143.

10. To what share of the value is the dower, which the widow was entitled to, in the lands alienated by the husband during marriage?

It is one-third of the value, at the time of alienation, and no more.—*Shaw v. White*, 13 *Johns. Rep.* 179. *Stearns v. Swift*, 8 *Pickering*, 532. *Ayer v. Spring*, 9 *Mass. Rep.* 8. *Catlin v. Ware*, 9 *Mass. Rep.* 221. *Lambert's Treatise on Dower*, 106, and the case there cited. *Wright v. Jennings*, 1 *Bailey's S. C. Rep.* 277. *Gore v. Brazier*, 3 *Mass. Rep.* 544.

Mr. Chancellor Kent says, the reason of the rule has been ably criticised in this country, but the rule itself is founded in justice and sound policy.—*Brown v. Duncan*, 4 *McCord's Rep.* 346. But against the heir she is to have dower in improvements made by him after the descent, if her dower be not assigned to her before they are made.—*Catlin v. Ware*, 9 *Mass. Rep.* 221. *Lambert's Treatise on Dower*, 106, 107.

11. Shall not a widow be endowed when a man has the seisin of an estate, though for an instant, beneficially for his own use?

She shall. But where the husband is the mere instrument for passing the estate, although there may be an instantaneous seisin, the widow shall not be endowed.—1 *Thomas' Coke*, 665, note (g.) *Preston Est.* 549. 2 *Bac. Abridg.* 371. *Griggs v. Smith*, 7 *Halst. N. J. Rep.* 23. *Holebrook v. Finney*, 4 *Mass. Rep.* 561. *Stow v. Tift*, 15 *Johns. R.* 465. *Reed v. Morrison*, 12 *Serg. & Rawle's Penn. Rep.* 21. *Smith v. Eustis et al.*, 7 *Green*, 41. *Lambert's Treatise on Dower*, 28.

21. Will a mere transitory seisin entitle the wife to dower?

It will not, either in law or equity.—*Smith v. Eustis et al.*, 7 *Green*, 41. *Griggs v. Smith*, 7 *Halst. N. J. Rep.* 33. *Stow v. Tift*, 15 *Johns. Rep.* 458. *Holebrook v. Finney*, 4 *Mass. Rep.* 561. *Brown v. Duncan*, 4 *McCord's S. Ca. Rep.* 351.

13. Will not the same evidence of seisin which would entitle the heir to recover in ejectment, sustain an action of dower?

It will.—*Jackson ex dem. v. Waltermire*, 5 *Cowen's N. Y. Rep.* 299.

14. Is a wife barred of her dower by a conveyance in which she joined her husband, if she is not privately examined by the magistrate who takes her acknowledgment?

She is not.—*Thompson v. Morrow*, 5 *Serg. & Rawle's Penn. Rep.* 289. *Reed v. Morrison*, 12 *Serg. & Rawle's Rep.* 23. Nor if, indeed, it does not appear in the certificate of the acknowledgment, that the contents of the deed were made known to the wife by the justice.—*Barnet v. Barnet*, 15 *Serg. & Rawle's Penn. Rep.* 72.

15. Is a wife barred of her dower, unless there be apt words of a grant in the deed, showing an intention on her part to relinquish her dower?

She is not.—*Catlin v. Ware*, 9 *Mass. Rep.* 218. *Powel et ux. v. Monson & Bringfield Manufacturing Company*, 3 *Mason's U. S. C. C. Rep.* 349. *Luskin v. Curtis*, 13 *Mass. Rep.* 223.

16. Is not a devise in lieu of dower, which is accepted, a good bar?

It is, when it will be considered in lieu of dower.—*Lorabee v. Van Alstyne*, 1 *Johns. N. Y. Rep.* 307. *Van Orden v. Van Orden*, 10 *Johns. Rep.* 30. *Picket & Wife v. Peay*, 2 *S. Ca. Rep.* 746.

17. Is a widow entitled to possession until her dower is assigned to her?

She is not.—*Siglar v. Van Riper*, 10 *Wend. N. Y. Rep.* 419. *The Inhabitants of Wyndham v. The Inhabitants of Portland*, 4 *Mass. Rep.* 384. *Sheafe v. O'Neale*, 9 *Mass. Rep.* 13. And a trespass lies against her.—*McCully v. Smith*, 2 *Bailey's S. C. Rep.* 103.

18. When it appears from the return of the commissioners that they have given the widow more than she is entitled to, will not the proceedings be set aside?

They will.—*Hawkins v. Hall et al.* 2 *Bay's S. Ca. Rep.* 449. *Lesesne v. Russell*, 1 *Bay's Rep.* 459.

19. Will not a record of assignment in the court of probate be presumed to have been made with the widow's knowledge?

It will.—*Tilson v. Thompson*, 10 *Pickg. Mass. Rep.* 359.

20. May not authority to demand dower for another be given by parol?

It may, and it is not necessary that it should be demanded on the land.—*Baker v. Baker*, 4 *Greenleaf's Maine Rep.* 68.

21. Is any demand of dower necessary at common law?

None at all.—*Jackson ex dem. v. Churchill*, 7 *Cowen's N. Y. Rep.* 287. *Hitchcock v. Harrington*, 6 *Johns. Rep.* 498.

22. Is not an agreement with the heir, to accept certain things in lieu of dower, a bar?

It is.—*Shotwell et ux. v. Sedam's Heirs*, *Ohio Cond. Rep.* 450. *S. Co. 3 Hammond's Rep.* 5.

23. Can a *feme covert* bar her right of dower by any release made to her husband, during coverture?

She cannot.—*Rowe v. Hamilton*, 3 *Greenlf. Me. Rep.* 481. *Carson v. Murray*, 3 *Paige's N. Y. Ch. Rep.* 484.

24. Can the right of a widow to have dower assigned to her, in the hands of her husband, be taken in execution for her debt?

It cannot.—*Nason v. Allen*, 5 *Greenlf. Me. Rep.* 481. *Contra Williams v. Morgan*, 1 *Little's Ky. Rep.* 168.

25. Can a magistrate take the wife's renunciation of dower, upon a conveyance in which he is in any way interested?

He cannot.—*Scanlon v. Turner*, 1 *Bailey's S. Ca. Rep.* 421.

26. Has the jurisdiction of courts of equity in matters of dower, for the purpose of assisting the widow by a discovery of lands or title deeds, or for the removing of impediments to her rendering her legal title available at law, ever been doubted?

It has not.—*Fonbl. Eq. b. 1, ch. 1, § 3, note (f.)*

And indeed, says the celebrated American jurist, *Mr. Justice Story*, in his admirable commentaries on Equity Jurisprudence, *vol. 1, ch. 12, p. 576*, it is extremely difficult to perceive any just ground upon which to rest an objection to it, which would not apply with equal force to the remedial justice of courts of equity, in all other cases of legal rights in a similar predicament.

But the question has been made, how far courts of equity should entertain general jurisdiction, to give general relief in those cases where there appeared to be no obstacle to her legal remedy.—1 *Fonblanque Eq., Book 1, ch. 1, § 3, note (f.) Huddlestone v. Huddlestone*, 1 *Ch. Rep.* 38. *Parke on Dower, ch. 15, p. 317.*

Upon this question there has, in former times, been no inconsiderable discussion, and some diversity of judgment. But the result of the various decisions upon the subject is, that courts of equity will now entertain a general concurrent jurisdiction with courts of law, in the assignment of dower in all cases.—*Curtis v. Curtis*, 2 *Bro. Ch. Rep.* 620. *Mundy v. Mundy*, 2 *Ves. Jr.* 122, *S. C.* 4 *Bro. Ch. Rep.* 294. I am aware that *Mr. Park*, in his excellent Treatise on Dower, doubts if the doctrine is maintainable to this full extent. But notwithstanding his doubts, it appears to me the just result of the authorities, and maintainable upon principle. Indeed, *Mr. Park* seems to admit, that where a discovery or account is wanted, there seems no just objection to the jurisdiction—*Parke on Dower, ch. 15, pp. 317, 320, 325, 326, 329, 330, note (a.) Story's Equity Jurisprudence, vol. 1, p. 576.*

For further information on the subject of Dower, see the subsequent pages; also 4 *Kent, p. 36—85.*

DRUNKENNESS.

1. Can any person make a valid will, while he is deprived of his reason by intoxication?

He cannot.—*Prentice v. Achorn*, 2 *Paige's N. Y. Ch. Reports*, 31. *Admrs. of Lee v. Ware*, 1 *Hill's S. Ca. Rep.* 316. *Seymour v. Delancy*, 3 *Cowen's N. Y. Rep.* 518.

Mr. Chancellor Walworth said, that a person deprived of his reason in consequence of voluntary intoxication, is incapable of making a valid contract, is a proposition too plain to admit of doubt. The law on this subject is ably examined by Judge Prentiss, in *Barrett v. Buxton*, 2 *Atk. Vt. Rep.* 167. 2 *Kent*, 452.

But drunkenness is no excuse from the consequences of crime, and it should not be against those acts affecting property, unless brought about by the other party, or unless it was so total, as to be palpable evidence of frauds in the person entering into a contract with the one intoxicated.—*Bennet v. The State*, *Martin & Yerger's Rep.* 133. *Admrs. of Lee v. Ware*, 1 *Hill's Rep.* 317. *Foote v. Tewksbury*, 2 *Vt. R.* 97. *Prentice v. Achorn*, 2 *Paige's Ch. Rep.* 31. *Samuel v. Marshall*, 3 *Leigh's Va. Rep.* 572.

Yet courts of equity will relieve against acts done, and contracts made by him, while under this temporary insanity, where they are procured by the fraud or imposition of the other party.—1 *Fonb. Eq.*, b. 1, ch. 2, § 3. *Johnson v. Middlecott*, cited 3 *P. Will.* 130, note (a).

For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of courts of equity against his own grossly immoral and fraudulent conduct.—*Cooke v. Clayworth*, 18 *Ves.* 12. The maxim has sometimes been laid down, *qui peccat ebrius luat sobrius*.—*Hendrick v. Hopkins*, *Cary's R.* 93. But even at law, drunkenness is a good defence against a deed executed by a party, when so drunk, that he did not know what he was doing.—*Cole v. Robbins*, *Bull N. P.* 172. See 2 *Shelford on Lunatics*, ch. 7, p. 276. *Ibid.*, 304.

2. Should a contract be avoided on the ground that a party was intoxicated at the time of his assent, if it was afterwards given when not intoxicated?

It should not.—*Williams v. Inabent*, 1 *Bailey's S. C. Rep.* 343. *Arnold v. Hickman*, 6 *Munf. Va. Rep.* 15. *Reinicker v. Smith*, 2 *Har. & Johns. Md. Rep.* 423.

And if he does not return what he received as the consideration of his contracts, the instant he is restored to his senses, the jury may infer that he intends it to be confirmed.—*Williams v. Inabent*, 1 *Bailey's S. Ca. Rep.* 343.

For drunkenness is a ground of defence to which the court will not lend a very ready ear.—*Hall v. Moreman*, 3 *M'Cord's S. Ca. Rep.* 477.

And evidence of complete and total drunkenness ought to be clear and satisfactory.—*Admrs. of Lee v. Ware*, 1 *Hill's S. Ca. Rep.* 316.

3. Is it sufficient to set aside any act or contract on account of drunkenness that the party is under excitement from liquor?

It is not; it must arise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part; and without this, no contract or other act, can or ought to be binding by the law of nature.—1 *Fonbl. Eq.*, b. 1, ch. 2, § 3. *Cooke v. Clayworth*, 18 *Ves.* 12. *Reynolds v. Waller*, 1 *Wash. R.* 207. *Rutherford v. Ruff*, 4 *Desauss. Rep.* 350. *Wade v. Colvert*, 2 *Rep. Const. Ct.* 27. *Peyton v. Rolins*, 1 *Hayw.* 77.

Sir John Jekyll is said to have intimated an opinion that the having been in drink is not any reason to relieve a man against any deed or agreement, gained from him to encourage drunkenness. *Secus*, if through the management or contrivance of him who gained the deed, &c., the party from whom the deed has been gained, was drawn into drink.—*Johnson v. Medlicot*, 1734, cited 3 *P. Will.* 130, note (a). But this distinction seems wholly unsatisfactory; for in each case it is the fraud of the party who obtained the deed or agreement, which constitutes the ground of declaring it invalid; and the fraud is in morals and common sense the same, whether the drunken party has been enticed into the drunkenness, or becomes the victim of the cunning of another, who takes advantage of his mental incapacity.

The case of *Cooke v. Clayworth*, 18 *Ves.* 12, requires no such distinction, where the circumstances indicate fraud. In this last case, Sir William Grant said, “as to that extreme state of intoxication, that deprives a man of his reason, I apprehend that even at law it would invalidate a deed, obtained from him while in that condition.”—See also *Cole v. Robins*, *Buller, N. P.* 172. *Wigglesworth v. Steers*, 1 *Hen. & Munf.* 70. *Story's Commentaries on Equity Jurisprudence*, Vol. 1, ch. 6, p. 235, and note 5, same page. See also, 236–7.

Mr. Chancellor Walworth very properly remarked in the case of an habitual drunkard particularly, if the committee finds that any person is furnishing him with the means of intoxication, even gratuitously, he should apply to the court for an order restraining all persons from furnishing the drunkard with ardent spirits, or with the means of obtaining liquor, upon pain of contempt. In the *Matter of Heller*, 1832, 3 *Paige's N. Y. Rep.* 202. I would recommend the student to examine this case at length.

DURESS.

1. What is duress?

Duress is either imprisonment, or *per minas*. To constitute a duress by imprisonment, the imprisonment must be unlawful.—*Anon*, 1 *Salk.* 68. For if the imprisonment be lawful, and the party to procure his discharge, seals a bond or deed, it is not duress of imprisonment.—2 *Inst.* 482. But a bond cannot be avoided by duress of a stranger.—*Cro. Jac.* 187.

Duress per minas, must be to the person, and not to the party's goods, *Rex v. Southerton*, 6 *East*, 140. The highest obligation, a deed or a bond executed by a person under a well grounded apprehension of losing his life, or even his limbs, may be avoided by him.—2 *Inst.* 483. A man cannot avoid a bond by duress to his goods; (e. g.) attaching a barge on the river Thames, and the party giving a bond for the release of the barge.—*Sumner v. Ferryman*, 11 *Mod.* 202. *Meek v. Atkinson*, 1 *Bailey's S. Ca. Rep.* 84.

2. Are threats sufficient to avoid a deed ?

Menace of corporeal pain shall avoid a deed ; but the menace of his goods shall not.—*Noy's Maxims*, p. 19. Menaces which induce a fear of loss of life, of member, of mayhem, or of imprisonment, may avoid a deed ; but menacing to commit a battery, to burn his houses, or to spoil his goods, is not sufficient to avoid a man's deed.—*Edwards v. Handley*, *Hardin's Ky. Rep.* 605. 2 *Institutes*, 483. *Ba. Ab. Title Duress*, 156.

4. What will amount to a duress of threatenings ?

When a person by threats is so far intimidated and put in fear as to be thereby compelled contrary to his will, to execute a deed in order to escape from the consequences of these threats, this is called in law a *duress by threatening*. But the threats must be such as to strike with fear a person of common firmness and constancy of mind : and the law allows of no compulsion and duress by mere advice, direction, influence, and persuasion.—*Barrett v. French*, 1 *Conn. Rep.* 356.

A bond obtained by duress may be valid as against sureties, though not against the principal.—*Jones v. Turner*, 5 *Little's Ky. Rep.* 149.

DUTIES AND IMPOSTS.

Duties on goods imported do not accrue until their arrival at the port of entry.—*U. S. v. Vowell & McClean*, 5 *Cranch's Rep.* 368. 2 *Cond. Rep. S. C.* 280.

In a count in a libel upon the fiftieth section of the collection law of March, 1807, for unlading goods without a permit, it is not necessary to state the time and place of importation, nor the vessel in which it was made, but it is sufficient to allege that they were unknown to the attorney.—*Locke v. The U. S.*, 7 *Cranch's Rep.* 339.

1. What will amount to a probable cause for seizure ?

A doubt concerning the construction of a law may be good ground for a seizure, and authorize a certificate of probable cause.—*United States v. Riddel*, 5 *Cranch's*, 311. A doubt as to the true construction of the law, is as reasonable a cause for seizure as a doubt respecting the fact.—*The Friendship*, 1 *Gallis*. 111.

If there be a reasonable suspicion of illegal traffic or a reasonable

doubt as to the proprietary interest, the national character, or the legality of the conduct of the parties: it is proper to submit the cause for adjudication before the proper prize tribunal; and the captors shall be justified, although the court should acquit, without the formality of ordering further proof.—*The George*, 1 *Mason*, 24.

There can be no doubt that where there is *prima facie* evidence to condemn, or so much question and difficulty as to require further proof, the captors are completely justified; but these are not the only tests of a probable cause for the capture.—*The George*, 1 *Mason*, 24.

2. Can seizure be justified, merely upon the ground of probable cause?

A municipal seizure cannot be justified or excused upon the ground of probable cause, except where some statute creates and defines the exemption from damages.—*The Appollon*, 9 *Wheat*. 362.

Where there is probable cause of capture the captors are justified and exonerated from all losses and damages sustained by reason of the capture.—*The Rover*, 2 *Gallis*. 240.

To justify a seizure, there must be probable cause, and if an officer of the customs seize without probable cause, no indictment will lie on the seventy-first section of the act of March 2d, 1798, ch. 128, for resisting him in the seizure.—*United States v. Gay*, 2 *Gallis*. 359.

What constitutes probable cause is, when the facts are given, a question of law.—*Ibid*.

Probable cause is a sufficient justification for a capture; but such protection may be forfeited by subsequent misconduct or negligence.—*The George*, 1 *Mason*, 24.

EJECTMENT.

1. What is the nature of the action of ejectment?

An action of ejectment, although in form a fiction, is in substance a remedy pointed out to him who has a right to land, of which he is wrongfully deprived; it is the title of the lessor, and not of the nominal lessee, that is to be decided. If pending the action, the nominal lease expires, the term may be enlarged; if the lessor dies, his representatives are to be made parties.—*Canal v. Norwood*, 5 *Har. & Johns. Md. Rep.* 155.

This species of action is, in its nature, merely possessory, and an ejectment cannot be supported by a landlord against his own lessee, during the term demised, without a forfeiture thereof.—*Lessee of Penn v. Devilin*, 2 *Yeate's Penn. Rep.* 306. *City of Cincinnati v. White*, 6 *Peters' S. C. Rep.* 431. *Strother v. Lucas*, 12 *Peters' S. C. Rep.* 410. *Games et al. v. The Lessee of Dunn*, 14 *Peters' S. C. Rep.* 322.

2. For what will ejectment lie?

Whenever a right of entry exists, and the interest is tangible, so that possession can be delivered, an ejectment will lie.—*Jackson ex dem. Loux*

v. *Buel*, 9 *Johns. N. Y. R.* 298. It is a general rule, that an ejectment will lie for any thing attached to the soil, of which the sheriff can deliver possession.—*Jackson ex dem. v. May*, 16 *Johns. Rep.* 184. *Black v. Hopburn et al.*, 2 *Yeates' Penn. Rep.* 331.

The owner may maintain trespass for any injury to the soil, which is not incidental to the right of passage, acquired by the people. The land covered by a highway may be recovered in ejectment.—*Stackpole v. Healey*, 16 *Mass. Rep.* 36. *Jackson v. Hathaway*, 15 *Johns. N. Y. Rep.* 447, 491. *Babcock v. Lamb et al.*, 1 *Cowen's N. Y. Rep.* 238. An ejectment lies for a chapel which should be demanded as a messuage.—*Seaville's Case*, 11 *Co.* 25. So it lies for a stable.—*Dacre's Cases*, 1 *Lev.* 58. Also for a fishery.—*Rex v. The Inhabitants of Old Arlesford*, 1 *T. R.* 358. It lies for a kitchen.—*Adams on Ejectments*, 27. Or for an orchard.—*Ibid.* For mines.—*Whittingham v. Andrews*, 4 *Mod.* 143. And for mills.—*Fitzgerald v. Marshall*, 1 *Mod.* 90. And it lies for rooms; part of a house.—*Sullivan v. Segrave*, 1 *Stra.* 695. It lies for a manor.—*Adams on Ejectment*, 28. But not for a tenement, it being too uncertain.—*Goodtitle v. Walton*, 2 *Stra.* 834. *Goodrich v. Flood*, 3 *Wills.* 23. It will not lie for a ferry.—*Rees v. Lawless*, 6 *Little's Kentucky R.* 184. Nor for diverting a water course.—*Black v. Hepburn et al.*, 2 *Yeates' Penn. Rep.* 331.

3. What is the rule as to the description in the premises in an action of ejectment?

The ancient rule required the description of the premises in the declaration, to be so certain that the sheriff might know from his execution, exactly of what to deliver possession.—*Seward v. Jackson, ex dem.*, 8 *Caw. N. Y. Rep.* 427. *Fenwick v. Floyd*, J. T. 1 *Har. & Gill. Md. Rep.* 172. *Barney v. Patterson*, 6 *Har. & Johns.* 204. *Fitzhugh v. Hellen*, 3 *Ibid.*, 206.

Formerly it was necessary to describe the premises, for which an action of ejectment was brought, with great accuracy; but far less certainty is requisite in modern practice. All the authorities say that a general description is good.—*Barclay and others v. Howell's Lessee*, 6 *Peters' S. C. Rep.* 501.

4. Who may maintain an action of ejectment?

A tenant in common may maintain ejectment against his co-tenant on an actual ouster.—*Johnston v. Allen*, 12 *Mod.* 657. So may the conusee of a statute merchant or staple, and tenant by elegit.—*Taylor v. Cole*, 3 *T. R.* 295. *Doe v. Wharton*, 8 *T. R.* 2.

And an ejectment lies by and against an executor and administrator.—*Doe v. Potter*, 3 *T. R.* 13. *Jones v. Moffatt et ux.*, 5 *S. & R.* 523.—An attorney cannot bring an ejectment. A testamentary guardian may maintain an action of ejectment. So may a legatee on the executor's assenting.—3 *East*, 120. *Maddon v. White*, 2 *Term Rep.* 159. And one joint tenant may bring ejectment for his share.—*Doe v. Lounsdate*, 12 *East*, 39. *Roe v. Dlopis*, 4 *Cranch's U. S. Rep.*, 3 *Taunt.* 119. And parceners may maintain ejectment against each other on an actual ouster.

Adams on Ejectment, 52. And one partner may recover on his separate demise.—*Doe v. Baker*, 2 *Moore*, 189. So may a trustee, where the trust is executed in him.—*Doe v. Briggs*, 2 *Taunt.* 109. 8 *Petersdorff's Abr.* 571.*

5. Against whom may an action of ejectment be brought ?

It lies against a mere servant of another, who is unlawfully in possession.—*Doe v. Stradling*, 2 *Stark.* 187. But he must appear to be the visible tenant in possession, and assuming the character of a beneficial occupier.—*Doe v. Hamilton*, 1 *Chitty's Rep.* 118. *Watson v. Gilday*, 11 *Serg. & Rawle's Penn. Rep.* 337. *Woods v. Galbraith*, 2 *Yeates' Rep.* 306. *Cox v. Cromwell*, 3 *Binney*, 118. *Biddle v. Dougal*, 5 *Binney*, 149. *White v. Kyle*, 1 *S. & R.* 521.

6. What title is necessary to support the action of ejectment ?

The general rule is, that a person ought not to be made lessor, who has no claim or pretension to a subsisting title or interest in the premises.

If any person who may have once had a title is to be made lessor, the burden of deducing a title from him is taken from the plaintiff, and thrown on the tenant, which would be unreasonable.—*Jackson v. Richmond*, 4 *Johns. N. Y. Rep.* 482. *Jackson v. Ditz*, 1 *Johns. Cas.* 392. *Jackson v. Reynolds*, 1 *Caine*, 20. *Jackson v. Selewar*, 10 *Johns. R.* 363. *Shirac et al. v. Reinecker*, 2 *Peters' C. C. Rep.* 613. *Lessee of Clarke et al. v. Courtney et al.*, 5 *Peters' S. C. Rep.* 320. *The Society for Propagating the Gospel v. Pawlet*, 4 *Peters' S. C. Rep.* 480.

The plaintiff must show a right of entry, and it is enough for his purpose, if he does show a right of entry.—*Hylton's Lessee v. Brown*, 1 *Wash. C. C. Rep.* 205.

The lessor of the plaintiff must always count upon and show a possession of the land, within the time to which the writ of entry is limited.—*Den v. Morrie*, 2 *Halst. N. J. Rep.* 262. *Clay v. Ransom*, 1 *Munf. Va. Rep.* 455. *Jackson v. Sellick*, 8 *Johns. N. Y. Rep.* 262. *Jackson v. Johnson*, 5 *Cowen's N. Y. Rep.* 102. *Clay v. White et al.*, 1 *Munf.* 162.

The action of ejectment may be sustained, either on a right of entry or a title to enter, and the casting of a descent is no bar. A writ of ejectment may be used in all cases in which a writ of right can be sustained at common law.—*Lessee of Holt's Heirs v. Hemphill's Heirs*, 3 *Ham. O. Rep.* 332. *Lessee of Hall v. Vandegrift et al.*, 3 *Binn. Penn. Rep.* 374.

A mere intruder cannot be permitted to protect his intrusion under an outstanding title in a stranger.—*Jackson v. Herrington*, 4 *Johns. R.* 202. *Perryman's Lessee v. Callison*, 1 *Tenn. Rep.* 515.

7. What is the rule as to adverse possession ?

One principle is, that there can be no adverse possession where the plaintiff has not been legally out of possession; that title draws the possession to the true owner; that a possession of part by title, is a possession of the whole; and in a mixed possession, the legal seisin is in him who has the title.—*Davison's Lessee v. Beatty*, 3 *Harr. & McHen. Md. Rep.*

621. *Anderson ads. Darby*, 1 Nott & M'Cord, 369. *Barr v. Gratz's Heirs*, 4 Wheaton's U. S. Rep. 223. *Mather v. The Ministers of Trinity Church et al.*, 3 Serg. & Rawl. Penn. Rep. 509. *Gray v. Moffit*, 2 Bibb's Ky. Rep. 508. *Bryant v. Allen et al.*, 2 Hayw. N. Ca. Rep. 74. *Smith et al. v. Morrow*, 5 Little's Rep. 210. *Cadman et al. v. Winslow*, 10 Mass. Rep. 408. *Cheney v. Ringgold et al.*, 2 Harr. & Johns. Md. Rep. 87. *Hall v. Gitting's Lessee*, *Ibid*, 112.

It is a principle of law, that he who has title to a tract of land, and is in possession of a part, is in possession of the whole.—*Hammond v. Ridgeley's Lessee*, 5 Harr. & Johns. Md. Rep. 245. *Gray v. Moffit*, 2 Bibb's Ky. Rep. 508. *Green v. Litter*, 8 Cranch's U. S. Rep. 229. *Bryant v. Allen et al.*, 2 Hayw. N. Ca. Rep. 74. *Commonwealth v. Dudley*, 10 Mass. Rep. 408.

It is a principle of law, that if two persons are in possession of the same land, the one by title and the other by wrong, it is his possession who has the right.

Where a party enters into land without title, his seisin is confined to his possessions by metes and bounds.—*Jackson v. Porter*, 1 Paine's Rep. 458. *Cluggage et al. v. Lessee of Duncan*, 1 Serg. & Rawl. Penn. Rep. 111. *Davison's Lessee v. Beatty*, 3 Harr. & McHenry, Md. Rep. 621. *Cock's Lessee v. Dotson et al.*, 1 Tenn. Rep. 169. *Jackson v. McIntosh*, 8 Wheat. U. S. Rep. 571.

Possession may be adverse without written evidences of title, as without them there may be an ouster, either by decision, abatement, intrusion, or deforcement.—*Taylor v. Buckher*, 2 Marsh. Ky. Rep. 18.

8. Is the question of adverse possession to be decided by the court, or by the jury.

By the jury.—*Jackson v. Jadwin et al.*, 9 Johns. N. Y. Rep. 101.

9. How is adverse possession to be construed?

The doctrine of the court is, that it is to be taken strictly, and not to be made out by inference.

Every presumption is in favor of possession in subordination to the title of the true owner.—*Jackson v. Waters*, 12 Johns. N. Y. Rep. 365. *Jackson v. Porter*, 1 Paine's Rep. 457.

10. Who may defend the action of ejectment?

The tenants in possession are the proper if not the natural defendants to an ejectment; although the landlord has a right to be made defendant, through fear that he may be injured by a combination between the plaintiff and his tenant; but he may waive this right, or having asserted it, he may relinquish it by the consent of the plaintiff.—*Per Pendleton, President*.

The landlord, whose title is controverted, is in fact the real party.—*Herbert v. Alexander*, 2 Call's Va. Rep. 499, 2d edit. 418. Infants are entitled to defence by guardian, as landlord of the premises. Every person may be considered as a landlord for this purpose, whose title is connected to, and consistent with, the possession of the occupier. And it is

not premature for the landlord to be admitted before a default against the casual ejector.—*Jackson v. Styles*, 6 *Cowen's*, 589. *Styles v. Ten Eyck*, 1 *Wend. N. Y. Rep.* 316.

11. What is the rule of practice as to allowing amendments to the declaration in an action of ejectment?

In *Den v. Babcock*, 2 *Wash. C. C. Rep.* 308, the court said the practice of amending declarations by introducing new titles, would be highly inconvenient, and is altogether unnecessary, as distinct ejectments may be brought to try them. Where the demise is laid precedent to the plaintiff's title, it is cured by the statute of jeofails.—*Duval et al. v. Bibb*, 3 *Call's Va. Rep.* 362, 2d edit., 313. *Whittingham et al. v. Christian et al.*, 2 *Rand. Va. Rep.* 353.

If the plaintiff declare in one count for several pieces of land, and fail as to one piece, his declaration must fail. If the declaration contain several counts, the consequence might be different.—*Seward v. Jackson*, 8 *Cowen's Rep.* 428.

A declaration may be amended by altering the time of the demise.—3 *Hals. N. J. Rep.* 366. *Den v. Franklin*, 2 *South*, 358. *Contra*, *Dudley et al. v. Grayson et al.*, 6 *Monroe's Ky. Rep.* 259. *May's Heirs v. Hill*, 5 *Little's Rep.* 308. *Elliott v. Bohannon et al.*, 4 *Monroe's Rep.* 124. *Coneys v. Tibb's Heirs*, 4 *Monroe's Rep.* 442.

If the plaintiff had no title at the time of the demise, though a title may subsequently accrue, he cannot recover.—*Wood v. Grundy et al.*, 3 *Harr. & Johns. Md. Rep.* 13. *Doe v. Butler*, 3 *Wend. N. Y. Rep.* 154. *Bates v. Shattuck*, *Chip. Rep.* 69. *Dickinson v. Jackson*, 6 *Cowen's N. Y. Rep.* 147.

12. What is the effect of entering into the consent rule?

It confesses that the lessor executed the lease as stated in the declaration; but it does not admit the ability of the lessor to make the lease.—*Coleman v. Mabberry*, 3 *Monroe's Ky. Rep.* 220.

13. What is the effect of a former verdict in an action of ejectment?

In general a recovery in ejectment, like other judgments, binds only parties and privies; it is conclusive evidence in an action for mesne profits against defendant in possession or other defendant on record.—*Chirac et al. v. Reinecker*, 2 *Peters' S. C. Rep.* 621.

As to third persons strangers to the suit, the record is evidence to show possession of property in the plaintiff.—*Ibid*, 622.

It is conclusive evidence in an action for mesne profits against the tenant in possession, or other defendant on record.

But in relation to third persons, the judgment is not conclusive; and if they are sued in an action for mesne profits, they may controvert the plaintiff's title at large.—*Ibid*, 622.

The lessor in ejectment, may enter after judgment, without a writ of possession; and the judgment is evidence of his right of entry, as between the parties and privies, so long as the legal effect of it continues.

Jackson v. Haviland, 13 *Johns. N. Y. Rep.* 229. *Squire's v. Riggs*, 2 *Hayw. N. Ca. Rep.* 150.

14. What is the rule of recovery in actions for mesne profits?

The plaintiff recovers damages for the use and occupation of the land, and a recovery in such action is no bar to an action of trespass, for a trespass committed on the same land during the time for which the recovery was had for the mesne profits.—*Gill v. Cole*, 1 *Har. & Johns.* 403. *Murphy v. Guion's Exrs.*, 2 *Hayw. N. Ca.* 381.

The defendant is precluded from setting up any defence of which he might have availed himself in the original action, and cannot be permitted to prove that he was not in possession when the declaration was served.—*Murray v. Gouverneur*, 2 *Johns. Cases*, 438. *Jackson v. Combs*, 7 *Coven's N. Y. Rep.* 36. *Dewey v. Osborne*, 4 *Ibid.* 327. *Jackson v. Randall*, 11 *Johns. Rep.*, 405.

15. What is the effect of a disclaimer on the part of the tenant?

When a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and is open to the action of his landlord, as possession acquired originally by wrong.

The act is conclusive on the tenant; he cannot revoke his disclaimer and adverse claim, so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right.—*Wilson v. Watkins*, 3 *Peters*, 49.

16. What is the effect of a disclaimer by the landlord?

The relation of landlord and tenant is dissolved.—*Wilson v. Watkins*, 3 *Peters' S. C. Rep.*, 49. It shall not be permitted to the landlord to admit that there is no tenure subsisting between him and defendant, which can protect his possession from his adversary suit, and at the same time recover on the ground of there being a tenure so strong that he cannot set up his own adversary possession.—*Ibid.*, 50.

EQUITY.

1. What is equity in its most general sense?

It is that which in human transactions is founded in natural justice, in honesty and right, and which properly arises *ex equo et bono*. In this sense it answers precisely to the definition of justice or the natural law, as given by *Justinian in the Pandects*, 1 *Story's Commen. Equity Juris.* sec. 1, p. 1.

2. What is equity in its more refined sense, or as practised in England and the United States?

Lord Bacon in his aphorisms lays it down, *habeant similiter curia prætoria potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis*. And on the solemn occasion of accepting the office of Chancellor he said; Chancery is ordained to supply the law, and not to subvert the law.—*Bacon, Speech, 4 Bac. Works, 498.*

Finch, in his Treatise on the Law, says that the nature of equity is to amplify, enlarge, and add to the letter of the law.—*Finch's Law, p. 20.* And Mr. Woodson, without attempting to distinguish accurately between general or natural, and municipal or civil equity, asserts that "equity is a judicial interpretation of laws, which, presupposing the legislator to have intended what is just and right, pursues and effectuates that intention." The duties of equity are to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law.—1 *Blac. Comm., 92.*

Equity has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law.—*Story's Comm. on Eq. Jur. 32. Cooper's Eq. Pl., 120. Mitford's Eq. Pl., 112.*

3. What are the ten heads of equity jurisdiction as laid down by Lord Redesdale and Mr. Justice Story?

1. Where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy.

2. Where the courts of ordinary jurisdiction are made instruments of injustice.

3. Where the principles of law, by which the ordinary courts are guided, give no right but upon the principles of universal justice, the interference of judicial power is necessary to prevent a wrong.

4. To remove impediments to the fair decision in other courts.

5. To provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed.

6. To restrain the assertion of doubtful rights in a manner productive of irreparable damage.

7. To prevent injury to third persons by the doubtful title of others.

8. To put a bound to vexations and oppressive litigation, and to prevent a multiplicity of suits. And further that courts of equity, without pronouncing any judgment, which may affect the rights of parties, extend their jurisdiction.

9. To compel a discovery, or obtain evidence which may assist the decision of other courts.

10. To preserve testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation.—*Story's Comm. on Eq. Jur., 31.*

4. What are the leading maxims by which courts of equity profess to be governed ?

1. Equity follows the law.
2. Where there is equal equity, law must prevail.
3. He who is first in time, is first in right.
4. He who seeks equity, must do equity.
5. Equity looks upon that as done, which ought to be done.—*Story's Comm. on Equity Jurisprudence*, 78.

EVIDENCE.

OF THE ATTENDANCE OF WITNESSES.

1. How are witnesses compelled to attend ?

By the writ of subpœna *ad testificandum*. This writ commands the witness to appear at the trial to testify what he knows in the cause under the penalty of £100, to be forfeited to the king. And the *Stat. 5 Eliz., c. 9, s. 12*, gives an additional remedy by enacting that, "if any person (upon whom any process out of a court of record shall be served, to testify concerning any cause or matter depending there, and having tendered to him according to his countenance or calling, such reasonable sum of money for his costs and charges, as with regard to the distance of the place is necessary to be allowed.)

In some cases a subpœna can have no effect, as where the witness is in custody, or on board a ship under the command of an officer, who refuses to allow his attendance. The course then is to issue out a writ of *habeas corpus ad testificandum*.—1 *Phillips on Evidence*, 11.

2. What is the method of compelling a witness to bring into court papers which are deemed necessary evidence in the cause ?

A special clause must be inserted in the subpœna, called a *duces tecum*, commanding him to bring them with him. The writ of subpœna, *duces tecum*, as well as the other writ of subpœna, *ad testificandum*, is compulsory upon the witness.

ADMISSIONS BY A PARTY TO THE SUIT.

1. What is the general rule as to admissions ?

That admissions of a party to the suit against his interest are evidence in favor of the other side, whether made by the real party on record, or by a nominal party who sues as a trustee for the benefit of another.—*Bauerman v. Radenius*, 7 T. R. 664. *Craib v. Heth*, *Ibid*, 670, note ; or whether by the party who is really interested in the suit, though not named in the record.—*R. v. Hardwicke*, 11 East, 578, 589. *Dowden v. Fowle*, 4 Campbell, 38. *Johnson v. Keer*, 1 Serg. & Rawle, 25. *Vide Kirby*, 62,

174, 203, where it was held that the admission of a party in interest, if not joined in the suit, could not be given in evidence.

2. What is the rule as to the admission of partners ?

That the admission of a partner, though not a party to the suit, is evidence as to the joint contract against any other partner, as well after the determination of the partnership, as during its continuance.—*Wood et al. v. Braddick*, 1 *Taunton*, 104. But in *Hackley v. Patrick*, 3 *Johns. Rep.* 356, it was decided that an acknowledgment of an account by one partner, after a dissolution of the partnership, would not bind the other partners.—*Waden et al. v. Sherburn et al.*, 15 *Johns. Rep.* 409. *Sheldon v. Cock, Crawford & Co.*, 3 *Mumford*, 191. Such an acknowledgment would be sufficient to prevent the operation of the statute of limitations.—*Smith v. Ludlow*, 6 *Johns. Rep.* 267. *Sheldon v. Cock, Crawford & Co.*

3. What is necessary to render admissions evidence ?

That they be voluntary, and not extorted by threats or violence. If a threat be made, or promise held out to a person in custody, on a charge of felony, to induce him to make a confession, and he denies his guilt at the time, but afterwards makes a confession, which appears from the time and circumstances, not to have been induced by such previous threat or promise, this confession, so afterwards made, is a voluntary one, and proper evidence against him on his trial. *Moore v. The Commonwealth*, 2 *Leigh's Va. Rep.* 701. But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or a promise ; for however slight the promise or threat may have been, a confession so obtained cannot be received in evidence.—*Thompson's Case*, 1 *Leach's Cr.*, c. 327. *Cass' Case*, note (a.) *Ibid*, 328. *Warwickshall's Case*, 1 *Leach's Rr.*, c. 299. 2 *East's P. C.*, 568. In *Morrison v. The State of Ohio*, 8 *Hammond's Ohio Rep.* 438. The court held, that in a prosecution for concealing a horse-thief, it was not competent for the prosecution to prove the confessions of the alleged thief, in the presence of the defendant, to establish the fact that a horse was stolen.

A confession from the nature of the thing, is a very doubtful species of evidence, and to be received with great caution. It is hardly to be supposed that a man perfectly possessed of himself, would make a confession to take away his own life.—*State v. Long*, 1 *Hayw.* 455.

4. What must be shown in order to introduce parol evidence to prove a confession ?

It must be clearly proved that the confession was not reduced to writing.—1 *McNally*, 49. It does not appear necessary that the magistrate, acting judicially under the directions of the statute, should, in order to make the written confession evidence, warn the prisoner of its effects against him on trial.—1 *McNally*, 38.

5. How is the confession of a prisoner to be construed ?

It is not to be taken in parts, but the whole together ; that what is given in evidence is neither more nor less than the prisoner intended.

6. How are facts, admitted upon a confession improperly obtained, taken ?

It has been determined by the opinion of all the judges, that, although confessions improperly obtained, are not admissible, yet that any facts, which have been brought to light in consequence of such confessions, may be properly received in evidence.—1 *Phillips on Evidence*, 83.

7. What must be previously established in order to admit the declaration of a supposed agent ?

The fact of agency must be first established. For this purpose, the admissions of the principal are evidence against himself ; or the fact may be proved directly by the agent.

In mercantile cases a factor may generally prove his own authority. *Aliter*, in sales of land by an agent, which must be by written authority.—*Nicholson v. Miffin*, 2 *Yeates' Rep.* 38. To let in proof of the acts of an agent, it is necessary to establish the agency by other evidence than such as may be derived from the acts proposed to be proved.—*Scott v. Crane*, 1 *Conn. Rep.* 255. The mere declarations or acts of an agent shall not be admitted to prove agency.—*Plumsted v. Rudeback*, 1 *Yeates'*, 205.

8. What is the rule where one party refers another for information on a disputed fact to a third person, as authorized to answer for him, or employs an agent to make certain propositions respecting the transaction between himself and another ?

The rule is, that he is bound by what his agent says or does, within the scope of his authority, as much as if it had been done or said by himself.—*Daniel v. Pitt*, 1 *Campb.* 366. *Lloyd v. Willan*, 1 *Esp. N. P. C.* -178. *Gainsford v. Grammar*, 2 *Campb.* 9.

In the case of *Fabrigas v. Mostyn*, a point arose which may serve as an example to illustrate the rule here laid down.—11 *St. Tr.* 171. A witness, who had been employed by the defendant to convey certain proposals to the plaintiff, explained them to him by an interpreter, from whom also he received the answer ; the question was, whether the words of the interpreter could be given in evidence by the witness, as the answer of the plaintiff ; or whether the interpreter himself ought to be called, as the witness understood neither the question put to the plaintiff, nor the answer made by him. But *Mr. Justice Gould* ruled that the evidence of the witness was clearly admissible and sufficient.

Here the interpreter was the accredited agent of the parties, acting within the scope of his authority, and in the execution of his agency.

OF THE INCOMPETENCY OF WITNESSES.

1. By whom is the competency of witnesses to be determined?

By the court; whether there is *any* evidence, is a question for the judge; whether it is *sufficient*, is for the jury.—*By Buller, J., Comp. of Carpenters, &c. v. Hayward, Doug. 375. Bull. Wills v. Tucker, 3 Binney, 270, 370, 373. Hardway v. Manson, 2 Munf. 230. Roseboom v. Billington, 17 Johns. Rep. 182.* And whatever antecedent facts are necessary to be ascertained, for the purpose of deciding the question of competency or admissibility of evidence, as for example, whether a child understands the nature of an oath—or whether the confession of a prisoner was voluntary—or whether declarations offered in evidence as dying declarations, were made under the immediate apprehension of death; these and other facts of the same kind, are to be determined by the court, and not by the jury.

2. What by the law of England are the grounds of objection to the competency of witnesses?

They are four-fold. The first ground of incompetency is want of reason or understanding, a second ground is effect of religious principle, a third ground arises from conviction of certain crimes, or from infamy of character; the fourth and most general cause of incompetency is interest. Either of these grounds of incompetency will exclude the witness from giving any kind of evidence. “I find no rule less comprehensive than this,” said Mr. Justice Lawrence in the case of *Jordaine v. Lashbrooke, 7 T. R. 610*, “that all persons are admissible witnesses, who have the use of their reason, and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and who are not influenced by interest.”

3. What is the rule as to admission of children as witnesses?

That children who are unable to understand the moral obligation of an oath cannot be admitted to give testimony.—*Com. Dig. tit. “Testmoigne,”* u. 1. In *Brazier’s* case, on an indictment for assaulting an infant of five years of age with intent to ravish her, it was agreed by all the judges, that children of any age might be examined on oath, if capable of distinguishing between good and evil; but that they cannot be examined, in any case, without oath.

4. What is the rule as to defect of religious principle?

That Atheists, and such infidels as profess not any religion that can bind their consciences to speak the truth, are excluded from being witnesses.—*Bull. N. P. 292. 1 Atk. 40, 45.*

For the purpose of trying the competency of a witness, the proper question is, not as to his particular opinions, as whether he believes in

Jesus Christ; but whether he believes in the evidence of a God, and a future state.—1 *Phillips on Evidence*, 18.

Mahometans may be sworn on the *Koran*, and *Gentoos*, and upon the same principle all persons, according to the ceremonies of their religion. Whatever be the form, the meaning of the oath is the same.—*Morgan's Case*, 1 *Leach*, C. C. 64. By *Gold, J.*, delivering the opinion of all the Judges, *Cowp.* 390. *Fachina v. Sabine*, 2 *Stra.* 1104. *Omichund and Barker*, 1 *Atk.* 21.

5. What are the offences which incapacitate from giving evidence in courts of justice?

Treason and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, attaint of false verdict, and other offences of the same kind, which involve the charge of falsehood, and affect the public administration of justice. The whole class of offences which come under the denomination of felony.—*Gilb. Ev.* 126. *Bull. N. P.* 291. *Co Litt.* 6. b. *Hawk*, b. 2, c. 46, § 101. *Com. Dig. Testmoigne*, a. 5. 2 *H. P. C.* 277. *Fortesc. Rep.* 209. *Jones v. Mason*, 2 *Stra.* 833. *Walker v. Kearney*, 2 *Stra.* 1148. See the judgment of Sir *Wm. Scott*, in the case of *Ville D'Vorsovie et al.*, *Co. Litt.*, 6 b. *Com. Dig. Cushman v. Loker*, 2 *Mass. Rep.* 108.

6. How may competency be restored?

By pardon, either under the great seal, or by act of parliament.—*Cuddington v. Wilkins*, *Hob.* 67, 82.

7. What is the rule as to the admission of accomplices to give evidence?

That accomplices have been at all times admitted from a principle of public policy, and from necessity. But though accomplices are received as witnesses, their testimony ought to be received by a jury with a sober degree of jealousy and caution.—*H. C. P.* 303.

8. What is meant by approvement?

Approvement is, when a prisoner arraigned on a capital charge, confesses the fact before plea pleaded, and accuses his accomplices of the same offence.—*Rudd's Case*, *Cowp.* 335.

So it has been held, that where separate actions have been brought against joint trespassers, one of whom is a competent witness in the action against the other, the objection goes only to his credibility.—*Johnson v. Bowen*, 1 *Wash.* 187. A *particeps fraudis* is a competent witness to prove or disprove the fraud, as the grantor in a deed, to show that it was fraudulent.—*Jackson D'Moyes v. Frost & Huff*, 5 *Johns. Rep.* 125. *Loker v. Haynes*, 11 *Mass. Rep.* 498. Or the grantee to show that the grant was without consideration, and so fraudulent as to creditors.—*Hill v. Payson et al.*, 3 *Mass. Rep.* 559. *Croft v. Arthur et al.*, 3 *Desan's Eq. Rep.* 223. *Contra Fowler v. Norton*, 2 *Root*, 331. And in an action on the case for

a false affirmation, the person respecting whom the affirmation was made, was held a competent witness for the plaintiff.—*Wise v. Wilcox*, 1 Day, 22. *Smith v. Harris*, 2 Starkie's Rep. 47.

9. What is the rule as to the incompetency of witnesses from interest ?

The general rule is, that all witnesses interested in the event of the cause, are to be excluded from giving evidence in favor of that party, to which their interest inclines them. "Where a man," says Chief Baron Gilbert, "who is interested in the matter in question, comes to prove it, it is rather a ground for distrust than any just cause of belief; for men are generally so short-sighted, as to look at their own private benefit which is near to them, rather than to the good of the world, that is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biassed testimony, than to believe it."

10. What is the rule as to the nature of the interest which disqualifies a witness ?

The rule by which a witness is excluded on the ground of interest, seems to have fluctuated at different periods, but on a careful examination of all the authorities, ancient and modern, the general rule will be found to be, that if a witness will not gain or lose, by the event of the cause, or if the verdict cannot be given in evidence, *for or against him*, in another suit, the objection goes to his credit only, and not to his competency.—*Van Nuys v. Terhune*, 3 Johns. Cas. 83. The supreme court of Connecticut speaks precisely to the same effect. "The common law recognizes but one description of interest that shall exclude a person from testifying, that is, an interest in the event of the suit, merely an interest in the question, that is, having or being likely to have, a suit which may turn upon the same point, is not in legal estimation an interest. It is a bias affecting his credit but not his competency.—*Phelps v. Winchell*, 1 Day, 570. See further as to the general rule, that an interest in the question does not render a witness incompetent.—*Pettingall v. Brown*, 1 Caines' Rep. 171. *Baker v. Arnold*, *Ibid.* 276. *The People v. Howell*, 4 Johns. Rep. 302. *Stewart v. Kip*, 5 Johns. Rep. 255. *Fairchild v. Beach*, 1 Bay, 266. *Buckley v. Storer*, 2 Day, 521. *Wakely v. Hart and others*, 6 Binney's, 316. *Farrell v. Perry*, 1 Hayw. 2. *Porter v. McClure*, *Ibid.* 360. *Treasurer of the State, v. Val. Tayl.* 5. *Denn v. Beatty*, *Ibid.* 9. *Baring v. Reeder*, 1 Hen. & Munford, 165, 168. *Miles v. O'Hara*, 1 Serg. & Rawle's Rep. 32, 36.

In the case of *Miles v. O'Hara*, 1 Serg. & Rawle, 36, it is determined that an attorney, although he expects to receive a larger fee, if his client recovers, is a competent witness. Justice Yeates says, in delivering his opinion in this case, "the interest which disqualifies a person from giving testimony, must be certain, not possible, or even probable; he must be a positive gainer by the event of the cause, in which he is called to testify. In an action against a sheriff for the escape of a prisoner, in executions, for the jail liberties, the deputy sheriff who had taken the

prisoner's bonds for the liberties, was held a competent witness for the defendant: for the interest of the witness was barely possible, in consequence of his having taken the bond; it depended on the solvency of the obligors, and on the fact whether he had acted fairly and honestly in taking it.—*Stewart v. Kip*, 3 *Johns. Rep.* 256. Mr. Justice Buller says, "I take the rule to be this; if the witness can devise no benefit from the cause before the court, (meaning evidently from the context, no immediate benefit,) he is competent." Justice Spencer, in deciding the case of *Marquand v. Weeb & Weeb*, 16 *Johns. Rep.* 89, says, "My opinion proceeds upon the principle, that, whenever a fact is to be proved by a witness, and such fact be favorable to the party calling him, and the witness will derive a certain advantage from establishing the fact, in the way proposed, he cannot be heard, whether the benefit be great or small."

11. Would liability for costs in the event of a suit, disqualify a witness?

It would. Thus, the defendant's bail are not competent to give evidence for their principal.—*Barker v. Tyrwhitt*, *Camp.* 27. *Brind v. Bacon*, 5 *Taunt.* 183. *Hopkins v. Neal*, 2 *Stra.* 1026. *Gib. Ev.* 107. *Head v. Head*, 3 *Atk.* 511, 547. See 1 *Cox's Cases in Chan.* 286. So, in an action against the sheriff for a false return, the sheriff's officer is not a competent witness to prove that he endeavored to make the arrest.—*Powell v. Hard*, 2 *Lord Raymond*, 1411. 1 *Stra.* 650. *S. C.* 3 *Camp.* 523. So, in action by an infant plaintiff, his *prochein amy* or guardian are not competent witnesses for him.—*James v. Hatfield*, 1 *Stra.* 548. *Hopkins v. Neal*, 2 *Stra.* 1926. *Head v. Head*, 3 *Atk.* 511, 547. So in an action by an endorsee against the acceptor of a bill of exchange which had been accepted for the accommodation of the drawer.—*Jones v. Brook*, 4 *Taunt.* 464. *Hubby v. Brown & Nichols*, *Johns. Rep.* 7. mm

If a person promise a witness, that in case he recover the lands, he will grant him a lease of them for so many years, this excludes the evidence.

12. What is the rule as to the competency of a bankrupt to be a witness in a suit brought by his assignees?

That a bankrupt is not a competent witness, in an action by his assignees, to prove property in himself, or a debt due to himself, or in any other manner to increase the fund.—*Ewens v. Gold*, 1 *Bull. N. P.* 43. *Butler v. Cooke*, *Cowp.* 70. *Ex parte Burt*, 1 *Maddock*, 46. *McEwen v. Gibbs et al.*, 4 *Dal.* 137. The testimony of a bankrupt in England cannot be admitted to prove a debt on account due here.—*Coit, Admr. v. Exr. of Hawkins*, 3 *Dessauss. Eq. Rep.* 175. Nor can he prove his own act of bankruptcy, in explain an equivocal act, or prove the petitioning creditor's debt. Nor can he be questioned as to any antecedent act of bankruptcy, either in his examination in chief, or in his cross-examination.—*Wyatt v. Wilkinson*, 5 *Esp. N. P. C.* 187. *Elsom v. Brailey*, *MS. case*, in 1 *Selw. N. P.* 239.

A witness is competent, when called upon to testify by a party against whom he is interested: or in other words, a witness is competent when swearing against his own interest.—*Birt v. Wood*, 1 *Esp.*, 20 *Jackson*, *dm.* *Youngs et al. v. Vredenburg*, 1 *Johns. Rep.* 159. *Murray v. Wilson*, 1 *Binney*, 531. And where a witness is produced by the party against whom he is interested, the other may cross-examine him as to all matters pertinent to the issue on trial.—*Webster v. Lee*, 5 *Mass. Rep.* 334. If a witness, on examination on the *voire dire*, acknowledge that he has entered into an agreement, and at the same time produces a written agreement, this ought to be read.—*Butler et al. v. Owen*, 2 *Starkie*, 433.

13. What is the rule as to the admission of a party to the suit to give testimony?

A party to the suit on record cannot be witness at the trial for himself, as for a joint suitor, against the adverse party.—1 *Verm.* 230. *Wms.* 596. *Gilb. Ev.* 116. *Sharp v. Thatcher*, 2 *Dall.* 77. So it has been held that one joint appellee cannot be received as a witness for his co-appellees, either upon his releasing to them his interest in the subject in controversy, or upon *his* or *their* depositing with the clerk a sum of money sufficient to cover the costs.—*Cogshill v. Cogshill and others*, 2 *Hen. & Munf.* 467. But in the case of *Willings and Francis v. Consequa*, 1 *Pet. Rep.* 301, a party was admitted as a witness, having given a sufficient indemnity for costs.

14. What are the principal exceptions to this rule?

An exception to the general rule is stated by Roll, C. J., in the case of an action against a hundred, on the statute of Winton, where the plaintiff (the party robbed) was allowed to prove the robbery and the amount of his loss, "from necessity, on default of other proof."—*St.* 13, *Ed.* 1, c. 1. 2 *Roll. Ab.* 686. *Bull. N. P.* 289. One other exception appears to be made in the case of an action for a malicious prosecution.

Parties have been permitted to testify, in some of the states, to facts which were necessary to be shown, in order to authorize the admission of secondary or inferior evidence; as to prove the death of a subscribing witness, in order to let in evidence of the hand-writing.—*Douglass' Lessee v. Sanderson*, 2 *Dall.* 116. Or that he could not be found on inquiry.—*Chase and others v. Lincoln*, 3 *Mass. Rep.* 236. So, to prove the loss of a note, *Meeker v. Jackson*, 3 *Yeates*, 442. So, to prove the loss or destruction of a deed, previous to giving a copy in evidence. *Blandon v. Miller*, 1 *Hayw.* *Seckright d. Wright and Wife v. Bogan*, *Id.* 178, n. *Park v. Cochrane and others*, *Id.* 410. *Hayw.* 351. *Vide* 54, n. (a.) But it has been decided in Connecticut, that the loss or destruction of a deed was not a preliminary question, but a material and traversable fact, to which a party was incompetent to testify.—*Coleman v. Wolcot*, 4 *Day*, 388. An executor defendant is a competent witness to prove the state of the papers offered in evidence, when he found them, and where they were found, from the necessity of the case.—*Lenox v. Debaas*, 2 *Yeates*, 37.

If one of the parties to a suit is sworn and examined, at the request

of the other party, the latter cannot afterwards object to it.—*Miller v. Starkes*, 13 *Johns. Rep.* 504.

15. Upon an indictment against several for a misdemeanor, will one who suffers judgment by default, be qualified to give evidence against the other?

He will not, nor for them.—*Chapman v. Graves*, 2 *Camp.* 333. On an indictment against several for larceny, and no evidence appearing against one on the trial, application to admit him as evidence on the behalf of the other was denied.—*The State v. Carr et al.*, 1 *Cox's N. J. Rep.* 1.

So where a co-defendant, in a criminal prosecution, was tried separately, another defendant was held incompetent, on the ground of his being a party to the record.—*The People v. Bell*, 10 *Johns. Rep.* 95.

And where one of the defendants, in an action on a joint contract, has obtained his discharge under the bankrupt law, he is an incompetent witness for the other.—*Ravenetalle v. Dunning and Chilton*, 3 *Esp.* 25.

But if the plaintiff go to trial against some of the defendants, without taking any steps to compel the other to plead, they are competent witnesses for their co-defendants.—*Wakely v. Hart and others*, 6 *Binney*, 316.

16. What is the rule as to the admission of husband and wife to give evidence for or against each other?

That they are inadmissible. The reason for excluding husband and wife from giving evidence, either for or against each other, is founded partly on their identity of interest, partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice.

They cannot be witnesses for each other, because their interests are absolutely the same; they are not witnesses against each other, because it is contrary to the legal policy of marriage.—*Co. Litt.* 6, b. *Hawk*, b. 2, c. 36, s. 70. *Gilb. Ev.* 119. *Bull. N. P.* 286. 1 *Phillips on Evidence*, 64.

17. What are the exceptions to this rule?

First, if a woman is taken away by force and married, she may be witness against her husband indicted on Stat. 3, H. 7, c. 2, for she is not a wife *de jure*.

Secondly, on an indictment for a second marriage during the continuance of a former marriage, though the first wife cannot be a witness, yet the second wife may, after proof of the first marriage.

Thirdly, a wife may be witness on the prosecution of her husband for an offence committed against her person. A wife is permitted to exhibit articles of peace against her husband.

So an affidavit of a married woman has been admitted to be read, on an application to the Court of King's Bench for an information against her husband, for an attempt to take her away by force, after articles of separa-

tion. On the trial of a man for the murder of his wife, her dying declarations are evidence against him.

Fourthly, where the wife has made contracts, with the authority and consent of her husband.

Fifthly, commissioners of bankruptcy may examine the bankrupt's wife on oath for the finding out of the estate, goods, and chattels of such bankrupt, concealed, kept, or disposed of by such wife, in her own person, or by her act or means, or by any other person.

Sixthly, upon an appeal against an order of bastardy, in the case of a married woman, Lord Hardwick and the other judges held, that she was a competent witness to prove her criminal connection with the appellant.

On an appeal against the removal of a woman, as the widow of A B, deceased, the woman was a competent witness on the part of the appellants to disprove the marriage.

Seventhly, it has been ruled at *nisi prius*, that a wife may be witness in an action between third persons, not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand.

Another exception to the general rule, by which husband and wife are excluded from testifying for or against each other, was made in the following case: Articles of agreement were entered into between the husband, wife, and C, the trustee of the wife; by which the husband permitted the wife to live separate from him; and the trustee C covenanted on the part of the wife, to pay the husband three thousand eight hundred dollars, on his delivering to the wife, for her separate use, the coach and horses which he had lately purchased. The husband brought an action of covenant against C, to recover the three thousand eight hundred dollars, and the declarations of the wife were offered in evidence by the plaintiff, to show the delivery of the coach and horses, and were admitted by the judge. On a bill of exception being brought, the court decided that the evidence was admissible.—*Fenner v. Lewis*, 10 Johns. Rep. 38.

OF CERTAIN EXCEPTIONS TO THE GENERAL RULE ON THE SUBJECT OF INTEREST.

1. What is the general rule?

It has been before stated as a general rule, that all persons, who gain or lose directly by the event of a cause, are incompetent to give evidence.

2. What are the principal exceptions to the above rule?

First, as to the evidence of informers. By the common law, informers, who are entitled under penal statutes to part of a penalty, are not competent witnesses. But by the particular provisions or policy of several acts of parliament they may be admitted.

Where a statute can receive no execution, unless a party interested be a witness, there he must be allowed, says Ch. B. Gilbert.

Secondly, on an indictment against private persons or corporate bodies, for not repairing a public bridge, or the highway adjoining, the inhabitants of the county, town, riding, &c., in which the bridge is situated, are competent witnesses, in support of the prosecution.

Thirdly, persons entitled to rewards on the conviction of offenders, whether the rewards are given by act of parliament, by proclamation, or by private persons, and persons entitled to the restitution of their property on the conviction of a thief, are competent to give evidence.—*State v. Coulter*, 1 *Hayw.* 3.

Lastly, it is the constant practice to admit agents to be witnesses for their principals, in order to prove contracts made by them on the part of the principal.—*Mackey v. Rhinelanders et al.*, 1 *Johns. Cas.* 408. *Jones v. Hake*, 2 *Ibid.* 60. *Burlingham v. Deyer*, 2 *Johns. Rep.* 189. *Ruan v. Gardner*, 2 *Condry's Marsh.* 706, b. *Fisher v. Willard*, 13 *Mass. Rep.* 380. But one who has sold goods as the agent of another, on a *del credere* commission, is not a competent witness in an action brought by the principal against the purchaser for the price of the goods sold.—*The New-York State Company v. Osgood et al.*, 11 *Mass. Rep.* 60.

The master of a vessel is a competent witness in an action on a policy of insurance, although interested to fix the loss on the underwriter, to avoid his own responsibility by the bill of lading.—*Hicks v. Fitzsimmons*, 2 *Condry's Marsh.* 706. *Wallace v. Child & Styles*, 1 *Dall.* 7.

OF THE ADMISSIBILITY OF COUNSEL OR SOLICITORS, TO GIVE TESTIMONY.

1. What is the general rule as to the admission of a counsellor or solicitor to give testimony of matters in which he has been professionally engaged?

The rule is, that confidential communications between attorney and client are not to be revealed at any period of time; not in an action between third persons; nor after the proceeding to which they referred is at an end; nor after the dismissal of the attorney.—*Wilson v. Rastall*, 4 *T. R.* 753, 760. *R—— v. Withers*, 2 *Campb.* 578. *Gainsford v. Grammar*, 2 *Campb.* 10. The privilege of not being examined to such points as were communicated to the attorney, while engaged in his professional capacity, is the privilege of the client, not of the attorney, and it never ceases.—*Jordan v. Hess*, 13 *Johns. Rep.* 493.

2. What is the rule as to an interpreter between an attorney and his client?

That the interpreter stands precisely in the same situation as the attorney himself.—*Du Barre v. Livette, Peake*, N. P. C. 78. 4 *T. R.* 756. *Parker v. Carter*, 4 *Munf. Rep.* 273.

The privilege of secrecy is so strictly confined to the cases of attorney, solicitor, or counsel, that not only physicians are admissible to disclose the knowledge which they have acquired in their professional char-

acters, as stated in the text, but a priest of the Romish church cannot refuse to answer questions respecting facts which come to his knowledge in a confidential communication, on the ground that it was made to him in the exercise of his clerical functions, and that the principles of his religion forbade him to disclose it.—*Butler v. Moore*, 1 *M'Nelly*, 223.

OF THE COMPETENCE OF THE PARTY INJURED.

1. What is the general rule as to the competence of the party injured, to give testimony in criminal prosecutions?

That the injured party may be a witness; although, on the conviction of the prisoner, he will in many cases be entitled to a reward.—*Commonwealth v. Moulton*, 9 *Mass. Rep.* 30.

2. What is the exception to this general rule?

The case of a prosecution for forgery, in which the party by whom an instrument purports to be made, is not admitted to prove it forged, if he would either be liable to be sued upon the instrument, (supposing it to be genuine,) or be thereby deprived of a legal claim against another.—*In Watt's Case*, *Hard.* 331. 2 *Salk.* 172, *S. C.* *Rhodes' Case*, 2 *Str.* 728. 1 *Leach, Cr. C.* 29, *S. C.* *Russell's Case*, 1 *Leach*, 10. *Caffy's Case*, 2 *East, P. C.* 995. *Taylor's Case*, 1 *Leach*, 255. *Crocker's Case*, 2 *New Rep.* 87.

When, however, the fact is merely collateral, and does not in any way contribute to the proof of the forgery, as where a witness is called to prove himself the person whom the prisoner intended to personate or describe, in such a case, his testimony has been admitted.—*Parr's Case*, 2 *Leach, Cr. C.* 487, 491. 2 *East, P. C.* 997, *S. C.*

In the case of *The People v. Howell*, 4 *Johns. Rep.* 296, 302, 303, Kent, Ch. J., observed, that the interest which the witness may have in the question put, is no longer the test, that degree of interest goes only to the credit of the witness. The exclusion of the witness in a case of forgery has, therefore, now become an anomaly in the law of evidence; for it is certain that the conviction of the party charged with forging a check, cannot be given in evidence, in a subsequent civil suit on the check; and as the reason of the old rule has ceased, by a sounder definition of the question of interest, and as it is now applied to other criminal cases, it would seem to be fit and proper that the rule itself should no longer be applied to the case of forgery. But the present case does not turn upon the validity of that rule, and therefore the court do not now interfere with it.

THE MEANS BY WHICH COMPETENCY OF AN INTERESTED WITNESS MAY BE RESTORED.

1. What is the regular mode of making the objections to the competency of a witness ?

The rule formerly was that the objection ought to be made on the *voire dire*, and was not to be allowed after the examination in chief.—*Turner v. Pearte*, 1 T. R. 720.

But a greater latitude has since been allowed. And now, if it is discovered during any part of the trial that a witness is interested, his evidence will be struck out.—*Ld. Lovett's Case*, 9 St. Tr. 640. *Perigal v. Nicholson*, 1 Whitewick, 64. *Howel v. Locke*, 2 Camp. 14.

There are two preliminary modes of proving a witness to be interested in cause ; first, by examining him on the *voire dire* ; or second, by showing his interest from other evidence, either parol or written.

But both these methods cannot be pursued at the same time ; for the election of one conclusively bars any subsequent recourse to the other.—*Miffin et al. v. Bingham*, 1 Dall. 272. *Bridge v. Wellington*, 1 Mass. Rep. 219, *Peake's Ev.* 186. 10 Mod. 193. 2 Hayw. 145.

2. How may the competency of an interested witness be restored ?

By release or payment. Thus it is said to have been solemnly agreed by the judges, that where a person had a legacy given him, and did release it, he was a good witness to prove the will.—1 Burr. 423. There are cases in which the interest of a witness may be so situated that it cannot be extinguished by a release ; a release technically operates only upon a present interest ; but when there is a present right to take effect *in futuro*, such a right may be presently released.—*Co. Litt.* 265. *Woods v. Williams*, 9 Johns. Rep. 123. *Jacobson v. Fountain*, 2 Johns. Rep. 170. *Abbey v. Goodrich*, 3 Day, 433.

3. What is necessary to restore the competency of a bankrupt to prove a debt due to his estate ?

It must be shown that he has obtained his certificate, and given to the assignees a release of his share in the surplus and in the dividends. If he gives a general release to his assignees it is sufficient.—*Ewens v. Gold*, Bull. N. P. 43.

4. How may a residuary legatee be rendered a competent witness in an action by an executor to recover a debt due to a testator ?

Only by releasing the residue, or by a release of the costs of the action from the attorney.—*Baker v. Tyrwhitt*, 4 Campb. 27. A release of all claim to the debt in question would not be sufficient.—*Boynnton Administratrix v. Turner*, 13 Mass. Rep. 391.

OF PRESUMPTIVE AND HEAR-SAY EVIDENCE.

1. What is understood by presumptive evidence ?

Presumptive evidence is, when the fact itself is not proved by direct testimony, but it is to be inferred from circumstances, which either necessarily or usually attend such facts.—*Gilb. Ev.* 442. 1 *Phillips on Evidence*, 111.

2. To whom does it belong to determine the force and effect of presumptive evidence ?

To the jury, who are to determine whether the circumstances are sufficiently satisfactory and convincing to warrant them in finding the fact in issue.—2 *H. Bl.* 297. *Ibid.* 112.

3. At the expiration of what time will a bond be presumed to have been paid ?

Twenty years, and it is said that payment may sometimes be presumed even within that time.—1 *Burr.* 434. *Cowp.* 109. After a lapse of 18 years the court would not permit judgment to be entered upon a bond and warrant of attorney, on an affidavit stating that the bond was duly executed and still remained due ; that the obligor was living, and that the reason why the judgment was not entered upon before, was the insolvency of the obligor ; the obligee should have shown a demand of payment, and an acknowledgment of the debt within the eighteen years.—*Ex'rs of Clarke v. Hopkins*, 7 *Johns. Rep.* 556.

4. What would be sufficient to rebut a presumption of payment, raised by lapse of time ?

Proof of the defendant's recent admission of the debt ; or by proof of the payment of interest within twenty years, which is an acknowledgment that the principal sum was not then discharged.—1 *T. R.* 270 ; or the presumption may be answered by proof of other circumstances, explaining satisfactorily why an earlier demand has not been made.—*Newman v. Newman*, 1 *Starkie*, 101. *Bailey v. Jackson*, 16 *Johns. Rep.* 210. *Cottle v. Payne*, 3 *Day*, 289. This period of twenty years must be exclusive of time during which the plaintiff was under disability to sue.—*Dunlop v. Ball*, 2 *Cranch*, 180. And must be exclusive of the period of tumult and confusion like the revolutionary war.—10 *Johns. Rep.* 417. *Brenton's Ex'rs v. Canon's Ex'rs*, 1 *Bay*, 483.

5. In what manner may payment of interest within twenty years be proved ?

By showing an endorsement to that effect, in the hand-writing of the obligor, or made by his direction ; or by an endorsement in the hand-writing of the obligee.

This point respecting an endorsement by the obligee was determined in the case of *Searle v. Lord Barrington*, 2 *Stra.* 826. 2 *Ld. Raymond*, 1370. *S. C.* *Pratt, Ch. J.*, rejected the evidence on the trial, but the other judges of K. B. held it to be admissible, on a second trial, many years after. *Lord Raymond, Ch. J.*, received the evidence, on which a bill of exceptions was tendered and signed. On writ of error in the Exchequer chamber, five judges thought it admissible, and two were of the contrary opinion. This judgment was afterwards affirmed in the House of Lords.

6. What length of time will support a presumption of a grant or charter against the crown?

Charters and grants from the crown may be presumed from great length of possession. Thus before the stat. 9, G. 3, c. 16, *Lord Mansfield, Ch. J.*, held that a possession and enjoyment for a hundred years, were evidence in support of a title against the crown.—*Case of the King v. Browne*, cited by *Lord Mansfield, Cowp.* 110. *Parker v. Baldwin*, 11 *East*, 488. *Mayor of Kingston v. Harmer, Cowp.* 102.

So a patent or grant of land from the state, which is matter of record, has been presumed, after a length of possession.—*Archer v. Sadler*, 2 *Hen. & Munf.* 370. *Dem. d. Hawks v. Tucker, Tayl.* 157. In an action of ejectment in which the plaintiff claimed under a grant, under the great seal of the state, a prior grant to the defendant was presumed from uninterrupted length of possession.—*Lessee of Alston v. Saunders*, 1 *Bay*, 26. A recovery, which is a conveyance of record, may be presumed.—*Hasledon v. Bradney*, 2 *Term Rep.* 159.

7. What is the general rule on this subject in the United States?

It appears, from unquestionable authority, to be, that grants, letters patent, a common recovery, and by-laws, may be presumed. Indeed the truth is, that every species of title can be presumed. If the law requires it to be by deed, or record, these can be presumed, as well as a title by parol. After twenty years' possession of land, a deed may be presumed.—*Courcier et al. v. Graham*, 1 & 2 *Hammond's Rep.* 163. *Maverick v. Auston*, 1 *Bailey's R.* 657. *Hepburn & Dundas v. Auld*, 5 *Cranch*, 252. *Giles v. Baremore*, 5 *Johns. Chan. Rep.* 551. *Sumner v. Child*, 2 *Conn. Rep.* 611. *Tinkham v. Arnold*, 3 *Green. Me. Rep.* 120. *Archer v. Sadler*, 2 *Hen. & Munf.* 370. *Sullivan v. Alston*, 2 *Haywood's Rep.* 128.

The doctrine of presumptions applies as well to corporal as to incorporeal hereditaments.—*Richard v. Williams*, 7 *Wheaton's U. S. Rep.* 109. *Sumner v. Child*, 2 *Conn. Rep.* 611. *University of Vermont v. Reynolds' Exrs.* 3 *Vt. Rep.* 557.

8. What is the general rule as to the admission of hear-say evidence?

Hear-say evidence of a fact is not admissible.—*Overseers of Germantown v. Overseers of Livingston*, 2 *Caines' Rep.* 107. *Jackson d. Watson v. Cris*, 11 *Johns. Rep.* 437. *Claiborne v. Parish*, 2 *Wash.* 146. *Gray v. Goodrich*, 7 *Johns. Rep.* 95. *Woodward v. Paine & Lake*, 15

Johns. Rep. 493. And the same principle is applicable to statements in writing, no less than to words spoken; whether spoken or written, they are equally inadmissible in evidence.

9. What are the principal exceptions to this rule?

First, in questions of pedigree, the declarations of deceased members of the family are admissible evidence to prove relationship; as, who was a person's grandfather, or whom he married, or how many children he had, or as to the time of a marriage, or of the birth of a child, and the like, of which it cannot be reasonably be presumed, that better evidence is to be procured.—*Higham v. Ridgway*, 10 *East*, 120. *Lord Chancellor's Judgment in the Case of Vowles v. Young*, 13 *Ves. Jun.* 143. *Jackson v. King*, 5 *Cowen's N. Y. Rep.* 237. *Jackson v. Etz*, *Ibid.*, 320. *Charlott Hall School v. Greenwell*, 4 *Gill & Johns. Rep.* 416. *Strickland v. Poole*, 1 *Dallas' Penn. Rep.* 14. *Waldron v. Tuttle*, 4 *New Hampshire Rep.* 371. *Vaughan v. Phebe*, 1 *Martin & Yerger's Tenn. Rep.* 1, 17. *Per Story, J.*, in *Chirac et al. v. Reinecker*, 2 *Peters' U. S. Rep.* 621. *Jackson v. King*, 5 *Cowen's N. Y. Rep.* 237. *Jackson v. Cooney*, 8 *Johns. N. Y. Rep.* 131. *Douglass v. Saunderson*, 2 *Dallas' Penn. Rep.* 118.

Declarations in the family, descriptions in wills, descriptions upon monuments, in bibles.—*Douglass' Lessee v. Saunderson*, 2 *Dallas*, 116. And registry books are all admitted.—*Stoever v. Whileman's Lessee*, 6 *Binney*, 416.

10. When is hear-say evidence admissible with respect to the death of a person?

Proof of a general report and belief of the death of a person is admissible. The fact that a soldier, or any other individual, was missing at a particular time, accompanied with a report and belief of death, must be in many cases not only the best, but the only evidence which can be supposed to exist after his death.—*Jackson v. Etz*, 5 *Cowen's N. Y. Rep.* 214, 319. *Jackson v. Boneham*, 15 *Johns. N. Y. Rep.* 228.

But the report that the body of a particular individual was found, and buried at a particular time and place, carries on the face of it an admission that, if it is well founded, it is not the best evidence which exists in the case.—*Ibid.*, 228.

Although pedigree may be proved by hear-say, the place of birth cannot.—*Rex v. Earth*, 8 *East*, 542. 15 *East*, 293, 294, note. *Bartlett v. Delprat*, 4 *Mass. Rep.* 702. *Bull*, N. P. 294. 1 *Phil. Ev.* 180. *Jackson v. Boneham*, 15 *Johns.* 226. 18 *Johns.* 39. *Berkley Peerage Case*, 4 *Campb.* 415.

11. When is hear-say evidence admissible with respect to boundaries?

That boundaries may be proved by hear-say evidence is a rule well established.—*See the cases collected*, vol. 2, p. 494.

When corners are lost, they may be proved by reputation. Witnesses may be examined to show that a corner once existed; that it has been

destroyed, and that it corresponded with the call of the entry or survey ; but they cannot be allowed to substitute one corner for another, or to contradict the evidence which is of record ; they cannot change a sugar tree to a hickory, or an ash to a beach.

The rule in the text prevails probably in all the states.—*Howell's Lessee v. Tilden et al.*, 1 *Harris & McHen.* 84, 368, 531. *Harris v. Powell*, 2 *Haywood's Rep.* 349. *Lilly v. Kintzmiller*, 1 *Yeates' Rep.* 28. *Caufman v. Cedar Spring Cong.*, 6 *Binn. Rep.* 59. *Smith v. Walker*, 1 *Carolina Law Rep.* 514. *Smith v. Newalls*, 2 *Little's Rep.* 160. Except in Connecticut, where a different rule has been adopted.—*Porter v. Warner*, 2 *Root's Rep.* 22.

12. Can the mere statement of what was uttered by a stranger be admitted to prove any circumstance on the trial ?

It cannot, by any established rule in the law of evidence.—2 *St. Tr.* 232, 414, 415, 761, 820. 3 *St. Tr.* 145, 210, 252. 4 *St. Tr.* 33. *Hawk.*, b. 2, c. 46, § 46. For the law admits of no evidence but such as is delivered upon oath, and the original expressions were not only uttered when the speaker was not under that obligation, but are liable to be forgotten, misunderstood, and unconsciously altered, by the party who repeats them.—*Hawk.*, b. 2, c. 46, § 46. *Bul. N. P.* 294. *Bac. Abr.*, *Evid. K. Burns, J.*, *Evid.* 111.

13. Is there any exception to this rule, respecting the rejection of hearsay evidence ?

There is one great and important exception, though it stands alone, rests upon the principles of substantial justice. This is the case of the dying declaration of a party murdered, respecting the causes which led to his situation, and which is constantly admitted in prosecutions for felony.—1 *Stra.* 449. 9 *St. Tr.* 161. 3 *Burr.* 1253. 1 *Leach*, 460, 500, 504. 2 *Leach*, 561. *Hawk.*, b. 2, c. 46, § 49.

14. Why is a dying declaration admitted as evidence ?

For this reason ; it is considered that when an individual is in certain expectation of immediate death, all temptation to falsehood, either of interest, hope, or fear, will be removed, and the awful nature of his situation may be presumed to impress him as strongly with the necessity of a strict adherence to truth, as the most solemn obligation of an oath administered in a court of justice.—1 *Leach*, 502. 1 *Gilb. Evid.* 210. *Williams, J.*, *Evid.* 1 *Phillips on Evidence*, 6th ed. 223.

In the case of *Thompson & Wife v. Trevanion*, which was an action of trespass and assault, Lord Ch. Justice Holt allowed what the wife said immediately on receiving the hurt, and before she had time to devise or contrive any thing for her own advantage, to be given in evidence. So on an indictment for a rape, what the girl said so recently after the fact as to exclude the possibility of practising on her, has been held to be admissible in evidence, as a part of the transaction.—*Brazier's Case*, 1 *East. Pl. Cr.* 444.

On an indictment for a rape, the fact of the prosecutrix making complaint of the outrage, and the state in which she was at the time of making the complaint are evidence, although the particulars of her statement are not evidence to prove the truth of her statement.—*Rex v. Clarke*, 2 *Starkie*, 241.

In an action for criminal conversation, the declarations of a wife at the time of her elopement, stating the reasons of her eloping (as that she fled from an immediate fear of personal violence), would be evidence against the husband.—6 *East*, 193. But a collateral declaration, respecting a matter which happened at another time, would not be admissible.

15. Can a witness be admitted to prove what was said by a witness who is dead, relative to a conversation on a former trial between the plaintiff and some of the defendants?

He cannot; as the evidence was not given between the same parties, it could only be received as hearsay.—*Boardman and others v. The Lessee of Reed & Ford and others*, 6 *Peters' S. C. Rep.* 328.

16. What is the rule as to proving boundaries by hearsay evidence?

That boundaries may be proved by hearsay testimony, is a rule well settled, and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there is none as to its legal force. But such testimony must be pertinent and material to the issue between the parties.—*Boardman and others v. The Lessees of Reed & Ford and others*, 6 *Peters' S. C. Rep.* 328.

17. What is meant by *prima facie* evidence?

Prima facie evidence of a fact, is such evidence as in judgment of law is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose.

The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict, and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such are understood to be the clear principles of law on this subject.—*Kelly v. Jackson et al.*, 6 *Peters' S. C. Rep.* 622.

Where it appears that a party in possession is entitled to a conveyance under an agreement of trust, the presumption is strong that a conveyance has been executed accordingly.

A conveyance from trustees to a *cestui que trust* has been presumed in much less time than twenty years.

What circumstances will justify the presumption of a deed, is a matter of law.—*Stoever v. Lessee of Whitman*, 6 Binney, 416.

After a long possession in severalty, a deed of partition may be presumed.—*Hepburn & Dundas v. Auld*, 4 Cranch, 262.

Where a sale under a power contained in mortgage, a drain of ten feet in width was excepted, it was intended, after a lapse of 16 years from the sale, that the drain had antecedently existed, and was found in usage, or was an exception in the previous deed of the land.—*Bergen v. Bennet*, 1 Caines' Cases in Error.

An original lease for a long term being produced, and proof given of possession for 70 years, it will be left to the jury to presume the *mesne* assignments.—*Earl v. Baxter*, 2 W. Black. 1228.

Lapse of time is permitted in equity to defeat an acknowledged right, on the ground only of its affording evidence of a presumption, that such right has been abandoned; it therefore never prevails when such presumption is outweighed by opposite facts or circumstances.—*Nelson v. Carrington*, 4 Munf. 332.

An equitable title may be barred by length of possession, but it cannot be shifted or transferred; what was once my equity, by my laches may be entirely extinguished, but it cannot, without my act, become the equity of another: it does not follow, therefore, that an equity may be acquired by length of possession, because by length of possession it may be barred.—*Ibid.*

EVIDENCE TO BE CONFINED TO THE POINTS IN ISSUE.

1. What is the rule as to confining testimony to the points in issue?

As, the sole object and end of evidence is to ascertain the truth of the several disputed facts or points in issue on the one side or on the other, no evidence ought to be admitted to any other point.

2. What is the rule as to the admission of testimony under the general issue of non-assumpsit?

That the defendant may give in evidence any thing which shows that the plaintiff at the time of the commencement of the suit, had not a good cause of action, or that nothing is due.—*Bull. N. P.* 152. 4 Taunt. 165. But the defendant cannot, under the plea of non-assumpsit, show any matter, that would not go to the gist of the action; but merely to discharge it. Nor will the defendant be allowed to prove under the general issue, that the contract was not with himself alone.—*Ziele v. Ex'rs of Campbell*, 2 Johns. Cas. 382. *Robinson v. Fisher*, 3 Caine's Rep. 99. Such an objection can only avail when the fact is pleaded in abatement.—1 Phillips on Evidence, 127.

3. What may be proved under the issue of *non est factum*?

That the party was incompetent to make a deed, or that the delivery of the writing was absolutely void at its execution; thus it may be shown,

that the defendant was at the time of the delivery a lunatic.—*Whelpdale's Case*, 5 Rep. 119. *Cabell v. Vaughan*, 1 Saund, 291, note f. *South v. Tanner*, 2 Taunt. 254, or that he was made to sign it when so drunk as not to know what he did; *Bull. N. P.* 172. *Pitt v. Smith*, 3 Campb. 34, or that the defendant was a married woman.—*Anon. C.*, 12 Mod. 609. *Lambert v. Atkins*, 2 Campb. 272. *Bull. N. P.* 172; or it may be shown that the deed was delivered an *escrow* on a condition not performed.—1 *Phillips on Evidence*, 127, 128.

4. What may be given in evidence under a plea of not guilty, in an action of trespass *quare clausum fregit*?

Such evidence as falsifies the declaration, by showing that the defendant did not break the close, as is stated in the declaration.—*Gilb. Ev.* 221. 1 *Ibid.* 129.

But the defendant under this plea cannot prove a license from the plaintiff; *Gilb. Ev.* 215. 2 *T. R.* 166, 8, or defect of the plaintiff's fences, *Co. Litt.* 283, a. *Gilb. Ev.* 216, or right of common, or right of way, or other easement.—*Hawkins v. Wallis*, 2 Wils. 173. 1 *Phillips on Evidence*, 129.

In trespass for taking goods the plaintiff can only prove the taking of such goods as are mentioned in the declaration, and in trespass for assault and battery, or *quare clausum fregit* where the declaration charges, the defendant on a certain day, and on divers other days assaulted, &c., the plaintiff may prove any number of trespasses within those limits, so in an action for criminal conversation, the plaintiff may prove several acts of adultery within the times specified; and in addition to this he may show indecent familiarities antecedent to the first mentioned day, though he cannot show a previous criminal connection.—*Duke of Norfolk v. Germaine*, 2 St. Tr. 6.

In an action for slander the plaintiff, after proving the words as laid in the declaration, may also prove that the defendant spoke other actionable words on the same subject, either before or afterwards.—1 *Phillips on Evidence*, 134.

5. What is the rule of admitting evidence in criminal prosecutions?

That all manner of evidence is rejected that is foreign to the point at issue. This rule is founded in common justice; for no person can be expected to answer, unprepared and at once, for every action of his life. In treason, therefore, no evidence is to be admitted of any overt act that is not expressly laid in the indictment.—1 *Phillips on Evidence*, 135. It would not be allowed to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence, as that charged against him. But on an indictment for uttering a bank note, knowing it to be forged, proof that the prisoner had passed other forged notes of the same kind, is evidence that he knew the note in question to be forged.

In trials for murder, former grudges and antecedent menaces are evidence of the prisoner's malice against the deceased.—1 *Phillips on Evidence*, 137.

6. What is put in issue by the plea of not guilty ?

All the material parts of the indictment; and under this plea the prisoner may give in evidence any matter of justification, excuse, or extenuation.—*Ibid*, 138.

7. What is the rule as to the admission of evidence of character in a civil suit ?

That the character of either party cannot be inquired into, unless it is put in issue by the nature of the proceeding itself.—*Bull. N. P.* 298. 1 *Phillips on Evidence*, 138. *Humphrey v. Humphrey*, 7 *Conn. Rep.* 119. *Anderson v. Long*, 10 *Serg. & Rawle's Pa. Rep.* 55.

8. What is the rule as to the admission of evidence of character in trials for felony ?

That the prisoner is always permitted to call witnesses to his general character; and when the evidence against him is doubtful, such testimony may be sufficient to warrant an acquittal.—*Vide Commonwealth v. Hardy*, 2 *Mass. Rep.* 317. But unless the evidence is dubious, or the testimony presumptive, general character is entitled to little weight.—*The State v. Wells* 1 *Cox*, 414. 1 *Phillips on Evidence*, 140.

OF EVIDENCE IN COURTS OF EQUITY.

1. What are the general rules of evidence in courts of equity ?

They are the same as they are at law; and the question of the competency or incompetency of witnesses, and of other proofs, is also the same in both courts.—2 *Story's Comm. on Eq. Jur.* 741.

2. What are the principal exceptions to this general rule ?

1. In almost all cases, testimony is positively required by courts of equity to be by written depositions, which courts of law do not allow.—2 *Story's Comm. on Eq. Jur.* 743. 2 *Madd. Chan. Pract.* 330. *Higgins v. Mills*, 5 *Russ. R.* 227. 2 *Daniel Chan. Pract.* 441.

2. In courts of law, the testimony of the parties themselves in civil suits is ordinarily, if not universally, excluded. But in courts of equity, the parties, plaintiffs as well as defendants, may reciprocally require and use the testimony of each other, upon a bill or cross-bill for the purpose.—2 *Story's Comm. on Eq. Jur.* 473. 2 *Fonbl. Equity*, b. 6, ch. 1, § 1. *Remsen v. Remsen*, 2 *Johns. Ch. R.* 501. *Marshfield v. Weston*, 2 *Ver.* 176.

In like manner courts of equity admit the testimony of certain persons to facts, which perhaps they would not be, or might not be, competent to prove in a court of law.

An answer by the defendant as to matters of fact, of which the bill seeks a disclosure from him, is conclusive proof in his favor, unless it is

overcome by the satisfactory testimony of two opposing witnesses, or of one witness, corroborated by other circumstances and facts, which give to it a greater weight than the answer, or which are equivalent in weight to a second witness.—*Pember v. Mathews*, 1 Bro. Ch. K. 52. *Walton v. Hobbs*, 3 Atk. 19. *Jansan v. Rainey*, 2 Atk. 140. *Arnot v. Biscoe*, 1 Ves. 97. *Cooth v. Jackson*, 6 Ves. 40. *East India Company v. Donald*, 9 Vesey, 275, 283. *Pilling v. Armitage*, 12 Vesey, 78. *Cooke v. Clayworth*, 18 Vesey, 12. *Savage v. Brockshop*, 18 Ves. 335. *Clarke's Executors v. Vanreinsdyk*, 9 Cranch, 160. *Smith v. Brush*, 1 Johns. Ch. Rep. 459, 462.

The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation of facts, which he makes; and thereby he admits the answer to be evidence of that fact.

We are, however, carefully to distinguish between cases of this sort, where the answer contains positive allegations as to facts responsive to the bill: and cases where the answer, admitting or denying the facts in the bill, sets up other facts in defence or avoidance. In the latter cases, the defendant's answer is no proof whatsoever of the facts so stated; but they must be proved by independent testimony.—2 *Story's Eq. Jur.* 745, *Gilbert's For. Roman.* 51, 52. *Hart v. Ten Eyck*, 2 John. Ch. Rep. 88.

In the civil law the parties to a suit might be interrogated upon articles propounded to them under the direction of the judge. And two witnesses were generally required for the establishing of all the material facts not made out in writing, or by the solemn admission of the parties in court.—2 *Story's Com. on Eq. Jur.* 745. *Cod. lib. 4, tit. 20, l. 1, 9, § 1.* *Poth. ad Pand., lib. 22, tit. 5, n. 19.*

OF THE EXAMINATION OF WITNESSES.

1. What is the ordinary mode of proceeding in courts of common law, preparatory to the examination of a witness?

To swear him in chief, unless an objection should be made to his competency; in which case the practice formerly was to examine him on the *voire dire*, and this was so strictly observed, that if a witness were examined in chief, he could not afterwards be objected to on the ground of interest. But, in later times, the rule has been relaxed; and now, if it should be discovered, in any stage of the trial, that a witness was interested, his evidence will be rejected.

The examination of a witness, to discover whether he has any interests in the cause, is frequently to the same effect as his examination in chief; it therefore saves time, and is more convenient, that the witness should be sworn in chief in the first instance; and if it should afterwards appear that he is interested, it will then be time to take the objection.—1 *Phillips on Evidence*, 203.

2. By which party is the witness first examined?

By the party producing him, after which the other party is at liberty to cross-examine him.—*Ibid*, 205.

3. What are leading questions ?

Such as instruct the witness how to answer on material points, and are not allowed on the examination in chief. For to direct witnesses in their evidence would only serve to strengthen that bias, which they are generally too much disposed to feel, in favor of the party that calls them.—*Snyder's Lessee v. Snyder*, 6 *Binney*, 483. *Sheeler v. Speer*, 3 *Binney*, 136. 1 *Phillips on Evidence*, 205.

A witness cannot be compelled to answer any question which has a tendency to expose him to penalties or to any kind of punishment, or to a criminal charge.—*Sir J. Friend's Case*, 6 *St. Tr.* 6. *Lord Macclesfield's Case*, 6 *St. T. R.* 649. *R. v. Lord G. Gordon*, 2 *Doug.* 593. *Title v. Grevet*, 2 *Ld. Raym.* 1088. 16 *Ves. Jr.* 242. *Preamb. St.*, 36 *G. 3, c.* 37. *Cates v. Hardacre*, 3 *Taunt.* 424.

4. To what only should a witness depose ?

To such facts as are within his own recollection. But to assist his memory, he may use a written entry in a book, or memorandum, or the copy of a memorandum ; and if afterwards he can positively swear to the truth of the fact there stated, such evidence will be sufficient. Papers may be shown to a witness on his examination, to refresh his memory, and enable him to correct any mistake which he may have previously made in giving his testimony.—*Steinbac v. Columbia Ins. Co.*, 2 *Caines' Rep.* 131. 1 *Phillips on Evidence*, 209.

5. What is the rule as to receiving the opinion of a witness ?

In general the opinion of a witness is not evidence ; he must speak to facts. But on questions of science or trade, or others of the same kind, persons of skill may speak, not only as to facts, but are allowed also to give their opinions in evidence.—1 *Phillips on Ev.* 209. *Morse v. The State of Connecticut*, 6 *Conn. Rep.* 9. *Grant v. Thompson*, 4 *Ibid.* 209. *Poole et al. v. Richardson*, 3 *Mass. Rep.* 330. *Dickenson v. Barber*, 9 *Mass.* 227. *Brabo v. Martin*, 5 *Miller's Lou. Rep.* 275.

A mere opinion is never admissible in evidence, except it be of scientific persons on scientific subjects, or in the case of compurgators.—*Carlis v. Little*, 1 *Green's N. J. Rep.* 232. *Brabo v. Martin*, 5 *Miller's Lou. Rep.* 275.

6. What is the object of cross-examination ?

To sift evidence and try the credibility of the witnesses, and great latitude is allowed in the mode of putting questions. The rule, however, is still subject to certain limitations. A witness cannot be cross-examined as to any fact, which (if admitted) would be collateral, and wholly irrelevant to the matter in issue, for the purpose of contradicting him by other evidence (in case he should deny the fact), and in this manner to discredit his testimony.—*Spencely v. De Wilmot*, 7 *East*, 108.

OF DEPOSITIONS, EXAMINATIONS, INQUISITIONS, &c.

1. In what cases are depositions most generally taken?

When a material witness is about to leave the kingdom, or resides abroad. And these depositions may be given in evidence, if at the time of the trial the witness has quitted the country.—1 *Phil. on Ev.* 270.

Except in a few instances, the courts of common law in England do not admit the depositions of witnesses in a foreign country, in evidence. But a contrary practice prevails in this country, and the courts of the United States, as well as the superior courts of the several states, permit a party in a suit to take the examinations of witnesses not amenable to the process of the court, to be read in evidence in the cause, certain forms calculated to prevent surprise and the introduction of false or partial testimony being observed.—*Swift's Ev.* 112, 113.

Depositions taken according to the *proviso* in the 30 sec. of the judiciary act of 1789, ch. 20, under a *dedimus potestatem*, according to the common usage, when it may be necessary to prevent a failure or delay of justice, are under no circumstances to be considered as taken *de bene esse*, whether the witness resides beyond the process of the court or within it; the provisions of the act relative to depositions *de bene esse*, being confined to those taken under the enacting part of the section.—*Sergeant's Lessee v. Biddle et al.*, 4 *Wheaton*, 508. The following cases relate to depositions taken *de bene esse*, and on commission in the United States courts.—*Gant v. Naylor*, 4 *Cranch's Rep.* 224. *Beale v. Thompson & Morris*, 5 *Cranch*, 70. *The Argo*, 2 *Gallison's Rep.* 314. *Gilpins v. Consequa*, 1 *Peters' Rep.* 85. *Lessee of Browne v. Gallaway*, 1 *Peters*, 291. *Willings & Francis v. Consequa*, 1 *Peters*, 301. 1 *Phillips on Ev.* 274.

2. Is it necessary that depositions be signed by the witness?

It is not. In *Fleming's Case*, on an indictment for a rape, all the judges concurred in opinion, that the depositions of a girl deceased, on whose person the crime had been committed, taken on oath by the committing magistrate, had been properly admitted in evidence at the trial, though the depositions were not signed by the deceased.—*Case of Fleming & Windham*, 2 *Leach Cr. C.* 996. 1 *Phillips on Evidence*, 278.

In all cases of equity and admiralty jurisdiction no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit, found in the record as evidence, unless the objection was taken thereto in the court below, but the same shall otherwise be deemed to have been taken by consent.—*The Merchants' Bank of Alexandria. v. Maria and Louisa Seton*, 1 *Peters' S. C. Rep.* 307.

In all cases where, under the authority of the act of Congress, a deposition of a witness is taken *de bene esse*, except where the witness lives at a greater distance from the place of trial, than one hundred miles, it is incumbent on the party for whom the deposition is taken, to show that the disability of the witness to attend continues; the disability being supposed temporary, and the only impediment to a compulsory attendance.

The act declares expressly, that unless this disability shall be made to appear on the trial, such deposition shall not be admitted or used on the trial.

This inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial, than one hundred miles; he being considered beyond a compulsory attendance.—*The Patapsco Insur. Company v. Southgate et al.*, 5 *Peters' S. C. Rep.* 604.

3. What is the general rule respecting the admissibility of depositions, after the death of the witness?

That they are not evidence, unless they have been taken judicially, and unless the party, whose interest would be affected by them, had an opportunity of being present and cross-examining the deponent.—1 *Phillips on Ev.* 284.

4. What are the principal exceptions to this rule?

1. The examination of a single woman before a magistrate, who charges any person with having begotten her with child, will be evidence after the woman's death against the reputed father, on his appearance at the sessions, to abide the order of the court, according to the recognizance.

2. The examination of a soldier before a magistrate, touching his settlement, is made evidence on an appeal by the mutiny act.

5. How are the certificates of consul, or vice-consul, received?

They have been compared to foreign judgments. But the vice-consul is not, properly speaking, a judicial officer: nor is his certificate to be admitted as evidence of the fact there stated.—*Waldron v. Coomb*, 3 *Taunt.* 162. *Roberts v. Eddington*, 4 *Rep. N. P. C.* 88.

6. What effect is given to the deposition of witnesses, examined on a coroner's inquest?

If the witnesses be dead or beyond the sea, their depositions may be read: for the coroner is an officer appointed on behalf of the public, to make inquiries about the matters within his jurisdiction.

An inquisition of *felo de se*, taken before the coroner *super visum corporis*, is considered by Lord Coke to be conclusive evidence of the fact, against the executors or administrators of the deceased. But Lord Hale, in his plea of the crown, is of a different opinion. And it is now settled, that such an inquisition may be removed into the King's Bench, and traversed by the executors and administrators of the deceased.—1 *Phillips on Ev.* 281.

7. What effect is given to an inquisition of lunacy?

It is evidence on the trial of an indictment, to show that the prisoner was insane, when he committed the offence. Such inquisitions are evidence even against third persons, who were strangers to the proceedings.

—*R. v. Bowler*, O. B. June, 1812, before Chief Justice Le Blanc, and the present Ch. J. of the Common Pleas, M. S.—1 *Phillips on Evidence*, 285.

OF THE PROOF OF FOREIGN LAWS, OF JUDGMENTS, OF CORPORATION CHARTERS, AND ACCOUNT BOOKS.

1. What is the rule as to the proof of foreign laws ?

The established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as other facts.—*Mostyn v. Fabrigas*, Cowp. 174. *Male v. Roberts*, 3 Esp. Report, *Story on Conflict of Laws*, 527. Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court of justice.

The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority, that the law respects it not less than the oath of an individual.—*Church v. Hubbard*, 2 Cranch's U. S. Rep. 187, 236. *Talbot v. Seeman*, Ibid, 38. *Malpica v. McKown et al.*, 1 Miller's Lou. Rep. 248. *Story's Comm. Conflict of Laws*, 527. *De Sobry v. De Laister*, 2 Har. & Johns. Rep. 192, 195, 229. *Crozier v. Dodge*, 3 Miller's Lou. Rep. 358.

2. Is the evidence of proof of a foreign law, to be left to the jury or to the court ?

It would seem that the proof would be determined by the court: for all matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what is, in point of law, the result of foreign law to be applied to the matters in controversy before them.—*Story on Conflict of Laws*, 528.

It is for the court to determine a question of law, the admissibility or inadmissibility of certain evidence to the jury. It is true, that if, what the foreign law is, be a matter of doubt, the court may decline deciding it, and may inform the jury that if they believe the foreign law, attempted to be proved, exists as alleged, then they ought to receive the instrument in evidence. On the contrary, if they should believe that such is not the foreign law, they should reject the instrument as evidence.—*Trasher v. Everhart*, 3 Gill & Johns. 234, 242.

3. What is the manner of proving foreign laws ?

That must vary according to circumstances. The general principle, that the best testimony or proof shall be required, which the nature of the thing admits of, applies to the proof of foreign laws as well as to other facts.

Generally speaking, authenticated copies of written laws, or other public instruments of a foreign government, are expected to be produced.—*Story on the Conflict of Laws*, 529. *Church v. Hubbard*, 3 Branch's U. S. Rep. 237.

4. What is the distinction between written and unwritten laws, in regard to the manner of proving them ?

It is this. The usual modes of authenticating foreign laws (as of foreign judgments), are by an exemplification of a copy, under the great seal of the state ; or by a copy proved to be a true copy ; or by the certificate of an officer authorized by law, which certificate must itself be duly authenticated.—*Church v. Hubbard*, 2 *Cranch*, 238. *Packard v. Hill*, 2 *Wend. Rep.* 411. *Lincoln v. Battella*, 6 *Wend. Rep.* 475.

But foreign unwritten laws, customs, and usages, may be proved, and indeed must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath. Sometimes, however, certificates of persons in high authority, have been allowed as evidence.—*Church v. Hubbard*, 2 *Cranch*, 237. *Dalrymple v. Dalrymple*, 2 *Hagg. Rep. App.* p. 15—144. *Brush v. Wilkins*, 4 *Johns. Ch. Rep.* 520. *Mostyn v. Fabrigas*, *Cowper's Rep.* 174.

5. What effect is given to a foreign seal ?

The public seal of a foreign sovereign, affixed to a writing purporting to be a written edict, or law, or judgment, is, of itself, the highest evidence of its authority, and courts of other countries will judicially take notice of such public seal.

But the seal of a foreign court does not prove itself, and therefore must be established as such by competent testimony. There is an exception to this rule in favor of courts of admiralty.—*Starkie on Evidence*, p. 2, § 92. *Delafield v. Hurd*, 3 *Johns. Rep.* 310. *De Sobry v. De Laistre*, 2 *Har. & Johns. Rep.* 193. *Henry v. Aidey*, 3 *East's Rep.* 221. 4 *Cowen's Rep.* 526, note. *Story on Conflict of Laws*, § 643, p. 531.

6. How are the statutes of the sister states proved ?

The written law of other states must be proved by an exemplification, and not by the printed statute books of such states.—*Packard v. Hill*, 2 *Wend. N. Y. Rep.* 411. In *Young v. The Bank of Alexandria*, 4 *Cranch*, 388. The subject was brought before the Supreme Court of the United States, when *Chief Justice Marshall* expressed his opinion that, whether the law were public or private, yet, being printed by the public printer, by order of the legislature, agreeably to a general act of assembly, for that purpose, it must be considered as sufficiently authenticated.—*Biddis v. James*, 6 *Binney's Penn. Rep.* 337.

7. How are judgments of a sister state authenticated ?

The copy of the record of the judgment alone, without the antecedent proceedings, is sufficient to maintain the issue on the part of the plaintiff ; as when an action is brought upon a judgment rendered in this commonwealth, it is enough for the plaintiff to produce a copy of the record of the judgment, without producing a copy of the writ.—*Rathbone v. Rathbone*, 10 *Pick. Mass. Rep.* 1.

8. What is the effect of a judgment of a court of concurrent jurisdiction ?

It is as a plea in bar, or evidence, conclusive between the same parties, upon the same matter directly in question in another court. This was the rule laid down by *De Gray, Chief Justice*, in delivering judgment in the *Duchess of Kingston's* case.—11 *State Trials*, 261. 1 *Phillips on Evidence*, 223. 1 *Peters' Rep.* 202. *Gardner v. Buckbee*, 3 *Cowen's N. Y. Rep.* 126. *Coit v. Tracy*, 8 *Conn.* 268. *Fairm. v. Bacon*, 8 *Conn. Rep.* 424, 425. *Fowler v. Savage*, 3 *Conn.* 99. *Betts v. Starr*, 5 *Conn.* 554, 555. *Baxter et al. v. The New England Marine Ins. Co.*, 6 *Mass.* 277. *Robinson et al. v. Jones*, 8 *Mass.* 536. *Thatcher et al. Ex'rs v. Gammon*, 12 *Mass.* 268. *Smith v. Whiting*, 11 *Mass.* 445. *Wright v. Daklyne*, 1 *Peters' U. S. C. C.* 202.

It is undoubtedly a rule, that a verdict and judgment thereon, upon the merits in a former suit, is, in a subsequent action between the same parties, where the cause of action, damages, or demand, is identically the same, conclusive against the plaintiff's right to recover, whether pleaded in bar, or given in evidence under the general issue, where such evidence is legally admissible ; and that such prior verdict and judgment need not be pleaded by way of *estoppel*.—*Shafer v. Stonebreaker*, 4 *Gill & Johns. Md. Rep.* 346, 360. *Betts v. Starr*, 5 *Conn. Rep.* 552.

9. Of what two kinds are copies of records in courts of justice ?

Under seal, and not under seal. Those under seal are called exemplifications, and are of higher credit than any sworn copies: for "the courts of justice that put their seal to the copy, are supposed more capable than a common person to examine, and more exact and critical in their examination;" these exemplifications are of two kinds; under the great seal of chancery, or under the seal of some other court.—1 *Phil. on Ev.* 289.

10. How are copies of records proved ?

As other transcripts, by a witness, who has compared the copy, line for line, with the original, or who has examined the copy, while another person read the original.—*Reed v. Margison*, 1 *Campb.* 470. *Rolf v. Dart*, 2 *Taunt.* 52. *M'Niel v. Perchard*, 1 *Esp. N. P. C.* 263. *Gyles v. Hill*, 1 *Campb.* 471, n. *Ibid.* 291.

11. How may a decree in the court of chancery be proved ?

By an exemplification under the seal of the court ; or by a sworn copy ; or by a decretal order in paper, with proof of the bill and answer. But it has been held, that the bill and answer need not be proved, if they are recited in the decretal order.—1 *Phillips on Evidence*, 294.

12. What is the mode of proving wills ?

The common form is, where the executor presents the will before the judge, without citing the parties interested, and deposes that it is the true and the last will of the testator, upon which the judge allows the will.

The proof in form of law is, when the will is exhibited before the judge in presence of the parties interested, and after a full examination is finally allowed. If the will be proved in common form, it may be disputed at any time within thirty years; but if it be proved in the more formal mode, and there be no proceedings within the time limited for appeals, the will cannot afterwards be disputed.—*Ibid*, 298.

13. How must corporation charters be proved?

It is sufficient to produce the charter in the printed statute book.—*Wood v. Jefferson County Bank*, 9 *Cowen's N. Y. Rep.* 205, 206.

Where a private corporation is plaintiff, it seems to be well settled that even under the general issue, the defendant may require proof of the incorporation.—*Lord Raym.* 1535. 8 *Johns. Rep.* 378. 14 *Ib.* 245. 1 *Johns. Cases*, 132. 10 *Mass. Rep.* 91. 19 *Johns.* 303. *Society for Propagating the Gospel v. Young*, *N. H. Rep.* 310.

14. How far are corporation books considered evidence?

The general rule is, that corporation books are evidence of the proceedings of the corporation, but then it must appear that they are the corporation books and that they have been kept as such, and the entries made by the proper officer, or some other person in his necessary absence.—*King v. Mothersell*, 1 *Stra.* 93. 12 *Vin. tit. Ev.* 91, *pl.* 16. 2 *Campb. J. P.* 101. *Turnpike Company v. McKean*, 10 *Johns. N. Y. Rep.* 154. *Gaines et al. v. Tombechee Bank*, 1 *Ala. Rep.* 52.

15. How far are bank books received as evidence?

Bank books duly authenticated and properly submitted to the jury, as competent evidence.—*Union Bank v. Knapp*, 3 *Pickg. Mass. Rep.* 96.

But see *Farmers' and Mechanics' Bank v. Boraef*, 1 *Rawle's Pa. R.* 155. Boraef, the plaintiff below, sued the bank in *assumpsit*, for money had and received, and on the trial produced his bank book, showing a deposit of \$800, made on the 7th of October, 1825. He also produced a witness, who swore that he, the witness, made that identical deposit for the plaintiff on that day. The defence was, that the money deposited was in fact \$80, and that the figures "800," had been set down in Boraef's book by mistake, instead of "80," by Henry Myers, a clerk in the bank, who received the deposit. To support the defence Myers himself was offered as a witness. A book belonging to the bank was also offered, in which, as was said, he, Myers, had at the time of the deposit entered it as of \$80, previous to his entry in the book of the plaintiff. The court rejected this book, and Myers without it could not undertake to swear at all. If the book belonging to Boraef, the plaintiff, had been lost or withheld, no doubt the bank entries might have been *prima facie* sufficient. If the bank relied on its own book, not only as the original entry, but as controlling and correcting the book of Boraef, it asked too much; for the main evidence of the contract was the document delivered to Boraef. He could not oversee the bank books, nor had he any business to examine them. He never intended to rely on their entries, but held in his own hand his

own voucher equal to a receipt; therefore the book offered by the bank would have been a sort of evidence quite inconclusive, as I take it, and worth very little, if unsupported; yet it by no means follows that it would have been no evidence at all. The book ought to have gone with the plaintiff's book, and with Myers' testimony to the jury.

16. How far are account books considered to be evidence?

A shop book is competent as a registry of the sales made in the course of the business.—*Roades v. Gaul et al.*, 5 *Rawle's Penn. Rep.* 407. A merchant or other person who makes the entries in his books himself, is permitted according to the practice of Massachusetts, and in most if not all the New England states, to make the suppletory oath respecting the charges. In regard to cash, the sums to be provided in that manner have been limited in Massachusetts to 40 shillings, or \$6.—*Union Bank v. Knapp*, 3 *Pickg.* 109.

OF PUBLIC WRITINGS NOT JUDICIAL, AND HISTORY.

2. What is the rule as to the admission of the journals of the House of Lords and House of Commons?

They are evidence of their proceedings. Thus an entry in the journals of the House of Lords, stating that a judgment below has been reversed, is evidence of the fact of reversal, and the journals have been admitted to prove an address from the House of Lords to the King, and the answer of the king.

A printed copy of public documents, transmitted to Congress by the President of the United States, and printed by the printer to Congress, is evidence.—*Per Kent, Ch. J., in Radcliff v. United States Insurance Co.*, 7 *Johns. Rep.* 38. In this case a printed copy of a letter from the British secretary of state to the ambassador was offered as evidence of the existence of a blockade.—1 *Phil. on Ev.* 305.

2. What validity is given to the public Gazette?

The Gazette is admitted in courts of justice to be good evidence. Proclamations for a public peace, or for the performance of quarantine, and any acts done by, or to the king, in his regal character, may be proved in this manner; and upon the same principle, articles of war, purporting to be printed by the King's printer, are allowed to be evidence of such articles.—5 *T. R.* 436, 443. *Quelch's Case*, 3 *St. T. R.* 212. A proclamation for reprisals, in the Gazette, is evidence of an existing war. Public notoriety is sufficient evidence of the existence of a war.—*Foster Disc.*, ch. 2 § 12, p. 219. Evidence, therefore, was not produced to prove this fact, though averred in the indictment, in the cases of *Sir Sohn Friend*, of *Sir Wm. Parkyns*, *Cook's Case*, and *Vaughan's Case*, which are reported in the state trials.

A declaration of war by a foreign government transmitted to this country by the English ambassador, and produced from the secretary of

state's office has been admitted as evidence of the commencement of hostilities between that government and another state.—*Thelluson v. Cosling*, 4 *Esp. N. P. C.* 266. 1 *Phil. on Ev.* 306.

3. Of what is the register of a ship evidence ?

It is evidence of the national character of the vessel, but it is not evidence of ownership, unless it can be shown that the party sought to be charged, assented to the register.—*Tinkler v. Walpole*, 14 *East*, 226. *Cooper v. Smith and others*, 4 *Taunt.* 802. *Smith v. Fudge*, 3 *Camp.* 456. *Frazer v. Hopkins*, 2 *Taunt.* 5. 2 *Camp.* 170. *Teed v. Martin*, 4 *Camp.* 90.

Upon the same principle, an entry in books kept in the office for licensing stage-coaches, is not any proof that persons named in the license are owners of a coach.—*Strother v. Willan*, 4 *Camp.* 24.

4. How are books in public offices received as evidence ?

They are received as evidence of facts to which the duties of the office relate. Thus, the register of the navy office has been admitted in evidence, to prove the death of a sailor. The book from the master's office in the Court of King's Bench, to prove a person one of the attorneys of that court ; and the log-book of a man-of-war, which convoyed a fleet, to prove the time of the convoy's sailing. Bank books are good evidence to prove the transfer of stock.—1 *Phillips on Ev.* 312.

An entry in the book kept at Lloyd's, stating the capture of a ship, is evidence of that fact, though it is not a sufficient notice of it to the defendant, so as to make him liable on a policy of insurance.—*Abel v. Potts*, 3 *Esp. N. P. C.* 212.

5. What is the rule as to the admission of histories as evidence ?

A general history may be admitted, says Mr. Justice Buller, to prove a matter relating to the kingdom at large. Thus, in the case of St Catherine's hospital, Lord Hale allowed Speed's Chronicles to be evidence of a particular point of history in the time of Edward III., and this book was admitted as evidence of the death of Edward the Second's queen. Histories, however, cannot be admitted as proof of a private or particular custom. Camden's Britannia was therefore rejected on issue, whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town, or only in certain places.

As the records of the land office are of great importance to the country, and are kept under the official sanction of the government, their contents must always be considered, and they are always received in courts of justice, as evidence of the facts stated.—*Galt et al. v. Galloway et al.*, 4 *Peters' S. C. Rep.* 332.

An exemplification of a grant of land under the great seal of the state of Georgia, is, *per se*, evidence, without producing or accounting for the non-production of the original. It is record proof of as high a nature as the original. It is a recognition, in the most solemn form, by the government itself, of the validity of its own grant, under its own common seal,

and imports absolute verity, as a matter of record.—*Patterson v. Winne et al.*, 5 *Peters' S. C. Rep.* 233.

Historical facts of general and public notoriety, may be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts, which do not presuppose better evidence in existence; and where, from the nature of the transaction or the remoteness of the period, or the public general reception of the facts, a just foundation is laid for general confidence.—*Morris v. Harmer's Lessee*, 7 *Peters' S. C. Rep.* 554. 1 *Starkie on Ev.*, pl. 1, § 40-44, p. 60-64. 1 *Ibid.*, pl. 2, § 52, p. 180, 181. But the work of a living author, who is within the reach of process of the court, can hardly be deemed of this nature.

EVIDENCE OF CHARACTER, WHEN ADMITTED.

1. In what case is evidence of general character admitted?

The rule of law is, that in civil proceedings, unless the character of the party be directly put in issue by the proceeding itself, evidence of his general character is not admissible.—*Swift's Ev.*, 140. 2 *Starkie's Ev.* 366.

This rule has ever been regarded in our courts, and is too firmly established, to be shaken at this day.—*Humphrey v. Humphrey*, 7 *Conn. R.* 119. *Anderson v. Long*, 10 *Serg. & Rawl. Pa. Rep.* 55.

2. What is the rule as to the admissibility of general character in evidence in actions for criminal conversation?

That it is not admitted unless the general character be put in issue.

Per Peters, Justice.—In the case before us the plaintiff's general character was not in issue; but his character as a husband was. The object of the testimony offered, and rejected, was to evince that the wife of a drunkard might be debauched with impunity.—*Norton v. Warner*, 9 *Conn. Rep.* 172.

In cases in which character ought not to be allowed to be given in evidence, it often happens that facts and circumstances which were inducements to a transaction, are admissible, even though they may happen to involve character. Thus, in an action of assault and battery, though the defendant cannot give in evidence the bad character of the plaintiff, by way of excuse, he may prove that he had traduced his character, had insulted his wife or daughter, or that he had found him within his inclosure, attempting to steal his goods, or to excite his negroes to insurrection; or any other fact to show the motive which induced the act.—*Rhodes v. Bunch et al.*, 3 *McCord's S. Ca. Rep.* 66.

3. What is the rule as to the admissibility of character in evidence, in actions of slander?

Parker, C. J. We take the rule to be, that the general bad character of the plaintiff may be shown, because he relies upon its goodness before calumniated, as the principal ground of damages. A fair character has been maliciously attacked, and the law will repair the mischief by damages; but to a reputation already soiled, the injury is small.—*Rodwell v. Swan et ux.*, 3 *Pick. Mass. Rep.* 378. *Vick v. Whitefield*, 2 *Hayw. N. Ca. Rep.* 222. *Romayne v. Duane*, 3 *Wash. U. S. C. C. Rep.* 246.

This was an action for a libel, in which the court decided, that character being put in issue, the plaintiff might give evidence of his character before the defendants had attacked it.—*See 2 Esp. Nisi Prius*, 112. 3 *Mass. Rep.* 546. 1 *Johns.* 46.

4. What is the rule as to the admissibility of character, in evidence, in actions for rape?

That it is admissible, though not attempted to be impeached.

Per Daggett, Justice. It would not be going too far, perhaps, to say, that the general character of the witness, who is the victim of the outrage, in prosecutions for rape, and attempts to commit a rape, may always be shown.

Our books tell us, that if the witness in these cases be of good fame, it generally strengthens her testimony; if of evil fame, it is thereby lessened.—*The State v. De Wolf*, 8 *Conn. Rep.* 93.

When, after a promise of marriage, a woman is seduced, and deserted by her lover, in consequence of which she acquires a bad character, he shall not be permitted to avail himself of that character, in mitigation of the damages, in an action brought by her, for the injury arising from the breach of his promise to marry her.—*Boynton v. Kellog*, 3 *Mass. Rep.* 189.

5. May evidence of general character for drunkenness be admitted?

When intemperance has led, as it sometimes does, to a destitution of moral principles, and which in turn has led to a course of conduct inconsistent with all honesty and integrity, the character of a witness thus actually formed, may be proved by general reputation, as in any other case, without regard to the cause which produced it.—*Leiper v. Erwin*, 5 *Yerger's Tennessee Rep.* 97.

The court permitted the character of a creditor, for strictness and closeness in the collection of his debts, to be given in evidence, as a circumstance to show that a debt had been paid, after a lapse of eight years.

6. What is the rule as to the admission of parol evidence to prove an official character?

In general such evidence is admissible. To prove a general allegation that a party holds a particular office, it is sufficient to show that he acts in that capacity; such assumed character is sufficient against the party, as it operates by way of admission.—2 *Starkie's Ev.* 372, 3, 4. 4 *T. R.* 366. 3 *Johns. Rep.* 431. *Dean et al. v. Gridley*, 10 *Wend. N. Y. Rep.* 254. *Johnson v. Stedman*, 3 *Hammond's Ohio Rep.* 98, 99. *Stow*

v. Happing, 1 *Halst. N. J. Rep.* 125. *Gratz v. Wilson*, 1 *Halst. N. J. Rep.* 419. *Adams v. Jackson*, 2 *Aik. Vt. Rep.* 145.

7. May the character of a clergyman be proved by parol evidence?

A clergyman, in the administration of marriage, is a public civil officer, and in relation to this subject is not at all distinguished from a judge of the superior or county court, or a justice of the peace, in the performance of the same duty.—*Berryman v. Wise*, 4 *T. R.* 306.

And the admission that the acts of a clergyman in the celebration of marriage, is a *prima facie* proof of his official character, is not only commodious, but may be necessary, in order to prevent the deplorable consequences which might result from the requirement of higher evidence.—*Goshen v. Stonington*, 4 *Conn. Rep.* 218. *Damon's Case*, 9 *Greenleaf's Rep.* 149.

PAROL EVIDENCE.

1. What is the rule as to the admission of parol evidence to explain a written agreement?

It has been so frequently adjudged by the courts on both sides of the Atlantic, as to have the resistless force of a maxim, that parol cannot be received, in a court of law, to contradict, vary, or materially affect, by way of explanation, a written contract.—*Skinner et al. v. Hendrick*, 1 *Root*, 253. *Stackpole v. Arnold*, 11 *Mass. Rep.* 27. *Jackson d. Van Vechten et al. v. Sill*, 11 *Johns.* 201. *Jackson v. Bowen*, 1 *Caines' Rep.* 358. *Hawes v. Barker*, 3 *Johns. Rep.* 506. *Schermerhorn v. Vanderheyden*, 1 *Ib.* 139. *Thompson v. Ketchum*, 8 *Johns. Rep.* 189. *Jackson v. Croy*, 12 *Johns. Rep.* 427. *Jackson v. Foster*, 12 *Johns. Rep.* 488. *Jackson v. Sternbergh*, 2 *Johns. Rep.* 19. *Richard v. Killam*, 10 *Mass.* 239. *Payne v. McIntoir*, 1 *Mass. Rep.* 19. *Revere v. Leonard*, 1 *Mass. Rep.* 91. *Stover v. Freeman*, 6 *Mass. Rep.* 435. *King v. King*, 7 *Mass. Rep.* 496. *Townsend v. Well*, 8 *Mass. Rep.* 146. *Watson v. Boylston*, 5 *Mass. Rep.* 411. *Barker v. Prentiss*, 6 *Mass. Rep.* 430. *Murray v. Hatch*, 6 *Mass. Rep.* 477. *Hunt v. Adams*, 6 *Mass.* 519. *S. C.* 7 *Mass.* 518. *Carter v. Bellamy*, *Kirby's Rep.* 291. *Hungerford v. Thompson*, *Ibid.* 393. *Dunham v. Baker*, 3 *Day's Rep.* 137. *Treadwell v. Buckley*, 4 *Day's Rep.* 395. *Hunt v. Rousmanier*, 8 *Wheat. Rep.* 174. *Allison v. Rutledge*, 5 *Yerger's Rep.* 194, 195. *Dupree v. McDonald*, 4 *Desauss. Rep.* 212. *Holmes v. Simonds*, 3 *Desauss. Rep.* 149. *Fitzpatrick et al. v. Smith*, 1 *Desauss. Rep.* 345. *Stewart v. The State*, 2 *Har. & Gill's Rep.* 114. *Morris v. Edwards*, 1 & 2 *Hammond's Rep.* 84. *Babcock v. May et al.*, 4 *Hammond's Rep.* 346, 347. *Perine v. Cheeseman*, 6 *Halst. Rep.* 174. *Spiers v. Clay's Admrs.*, 4 *Hawke's Rep.* 22.

This rule (the preceding), however, does not exclude parol evidence of fraud, or want or failure of consideration in, nor the enlargement of the time for performance, or a waiver of the performance of a written simple contract.—*Erwin v. Saunders*, 1 *Cow. N. Y. Rep.* 250.

Without citing cases, or undertaking to enumerate all the exceptions to the general rule, it may be laid down as settled law, that parol evidence is admissible in cases of fraud and plain mistake in drawing a writing.—Since *Hurst's Lessee v. Kirkbridge*, 1 Binn. 616, cited per *Yeates, C. J.*, I have understood the law to be settled, that whatever passed at, and immediately before the execution of an instrument, might be given in evidence to impeach the firmness of the transaction.—*Christ v. Deffenbach*, 1 Serg. & Rawle's Penn. Rep. 464, 465. *Hunt v. Rousmanier*, 8 Wheat. U. S. Rep. 211.

2. Does this apply to marriage agreements ?

It does. In *Flemming v. Willis & Wife*, 2 Call's Va. Rcp. 14, 2d edit. *Pendleton, President*, observed, this is a bill for a specific execution of a marriage agreement, in which we are permitted by reason and authority, notwithstanding the agreement was reduced to writing, to hear parol evidence, of what was the real intention of the parties.

3. What is the rule in regard to mercantile instruments ?

That mercantile instruments may be expounded according to the usages and customs of merchants.—*Syers v. Bridge*, Doug. 527. *Chauraud v. Angerstein*, Beake's Cases, 43. As to what shall amount to a general warranty.—*Cutter v. Powel*, 6 T. Rep. 320. *Birch v. Depeyster*, 1 Starkie's Cas. 210. *Lucas v. Groaning*, 7 Taunt. 164. *Anderson v. Pitcher*, 2 B. & P. 164. *Yeates v. Pym*, 2 Marshall's Rep. 141.

Parol evidence is admissible to disprove the legal existence of an instrument or to rebut its operation. And the affidavit of a party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is proper. If such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, a copy of which can be proved, a party might be completely deprived of his rights, at least in a court of law.—*Taylor v. Riggs*, 1 Peters' S. C. Rep. 596.

4. Is the testimony which establishes the loss of a paper addressed to the court or to the jury ?

It is addressed to the court, and does not relate to the contents of the paper. It is a fact which may be important, as letting the party in to prove the justice of the cause, but does not itself prove any thing in the cause.—*Taylor v. Riggs*, 1 Peters' S. C. Rep. 597.

When a written contract is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily ; and if that cannot be done, the party is in the condition of every other suitor in a court, who makes a claim which he cannot support.—*Ibid*, 600.

Parol evidence may be offered to show an instrument is void on the ground of usury, or for a gaming debt, or been obtained by duress.—*Star*.

kie's Evidences, Vol. III. p. 1018. Shelbourn v. Inchiquin, 1 Bro. C. C. Rep. 338.

5. What is the reason given, why receipts are open to parol investigation ?

The true reason is, that they are usually general in their expressions, and many matters, not thought of at the time, might otherwise be controlled by their general expressions, contrary to right and contrary to the intention of the parties ; and many mistakes are made in settlements, to correct which, the doors of justice should not be shut by the general terms of a receipt, which describes no particulars of what is settled.

But when a receipt contains no general or vague expressions, but all is definitely descriptive of what is intended to be effected by it, such a receipt, like other writings in general, must not be assailed with parol testimony unless on the ground of fraud.—*Raymond v. Roberts, 2 Aiken's Vt. Rep. 204, 208.*

Parol evidence may be given of what passed between the parties at, and immediately before, the execution of a writing.—*Campbell v. McClenachan, 6 Serg. & Rawle.*

6. Is parol evidence admissible to show that the time fixed for the performance of a written agreement was subsequently enlarged by parol ?

It is.—*Nell v. Cheves, 1 Bailey's S. Ca. Rep. 537. Sharp v. Sipsey, 2 Ibid, 537.*

7. May a parol agreement between the endorser and endorsee of a promissory note, made at the time of endorsement, to give time to the maker, be admitted in evidence, on a question of diligence ?

It may.—*Brock v. Thompson, 1 Bailey's S. Ca. Rep. 322.*

8. What two classes of cases are there, in which parol evidence is admissible to explain or carry into effect a deed ?

One is, where the deed itself refers to any thing of which it does not itself furnish evidence. There parol evidence must necessarily be resorted to. The other class of cases is where the deed upon its face is certain, but some ambiguity is raised by parol evidence that the ambiguity may be removed by parol also. Such is the case put in the books where a man devised land to his son John, and it appeared that he had two sons of that name.—*Barkley v. Barkley, 3 McCord's S. Ca. Rep. 269, 272.*

9. Is parol evidence competent in a court of law to show that a deed absolute on the face of it, was intended to be conditional ?

It is not.—*Benton v. Jones, 8 Conn. Rep. 189. Hall v. Jewall et al., 7 Greenlf. 436.* It has often been decided in chancery that parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that a defeasance was omitted through fraud or mistake. Hence

a deed absolute on the face of it, and though registered as a deed, will, in chancery, be held valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, although the defeasance was, by an agreement, resting in parol.—*Washbourn v. Merrill*, 1 Day, 139. 1 Pow. Mort. 200. *Strong et al. v. Stewart*, 4 Johns. Chancery Rep. 167. *James v. Johnson et al.*, 6 *ibid.* 417. *Maxwell v. Lady Montacute*, Proc. in Chan. 526. *Dixon v. Parker*, 2 Ves. 225. *Markes et al. v. Pell*, 1 Johns. Chan. Rep. 594. *Clarke v. Henry*, 2 Cowen, 324. *Slee v. Manhattan Company*, 1 Paige, 48. Chancery interposes, because a court of law does not afford a remedy.—*Reading v. Weston*, 8 Conn. Rep. 121. *Hunt's Admrs. v. Rousmanier*, 1 Peters' U. S. Rep. 1.

10. May parol evidence be admitted to prove the time of adding a memorandum to a promissory note?

It may. Such evidence has no tendency to vary, control, or in any way affect the meaning of a contract.—*Haywood v. Perrin*, 10 Pick. Mass. Rep. 228.

11. May the contents of a legal process be proved by parol?

They may not. Thus the contents of the writ of *certiorari* could not be proved by parol, so long as the writ itself, or a sworn copy of it, might have been produced.—*The Case of Edmundston v. Plaisted*, 4 Esp. Rep. 160, shows the strict manner in which the contents of a process or the existence of it, is to be proved.—*Brush v. Taggart*, 7 Johns. N. Y. Rep. 19.

12. May it be shown by parol, that after the submission in writing, the parties agreed that the arbitrators should have power to call an umpire?

It may. Such an agreement is a new and independent contract, and not a variance of the written submission.—*Sharpe v. Sipsey*, 2 Bailey's S. Ca. Rep. 113. It has been decided that a notice to produce a paper might be proved by parol.—3 Caines, 174. *Turner & Wilson*. It was held in *Payton v. Hallet*, 1 Caines, 364, that an abandonment in writing might be proved by parol.—*Johnson v. Haight & Mathews*, 13 Johns. N. Y. Rep. 470.

13. May a former recovery be proved by parol?

It may not. But payment after judgment is a matter *in pais*, and provable by parol.—*Van Horn v. Frick*, 3 Serg. & Rawle's Rep. 278. *Inman v. Jenkins*, 3 Ham. Rep. 272, S. C. Ohio Cond. Rep. 569.

14. Is parol evidence competent to aid a defect in a sheriff's return?

It is not. The return can neither be extended nor diminished by testimony *ore tenus*, for this would be, virtually, to annul it, and to put every execution-title in jeopardy; or to make a title, when none has been made by legal evidence.—*Metcalf v. Gillit*, 6 Conn. Rep. 400, 404. It

is clear that the return of the sheriff on the execution, at the foundation of the plaintiff's title, is deficient in a necessary requisite; and that it cannot be aided by parol testimony.

The assertion that a sheriff, or other ministerial officer, may explain or contradict his return of "goods levied," "lands sold," or "in custody," on suits brought against him, founded on those returns, and while they remain in full force, and unaltered, sounds strangely, and appears unwarrantable.—*Shewell v. Fell*, 1304, 3 *Yeates' Penn. Rep.* 47.

15. May the suing out execution and delivery to the sheriff, be proved by parol?

It may, inasmuch that the issuing of execution and the delivery to the sheriff, are mere matters *in pais*.—*Lowry v. Walker*, 5 *Vermont Rep.* 181.

16. May the surrender, by bail, of his principal, be shown by parol?

It may not. The court held in this case, that a variance between the levy and the description in the sheriff's deed, may be explained by parol evidence.—*Lessee of Matthews v. Thompson et al.*, 3 *Ham. Rep.* 272, S. C. *Ohio Cond. Rep.* 569.

Parol evidence is not admissible to prove a surrender by bail of his principal. Indeed, the surrender itself must be of record, to justify the commitment of the principal, and being a matter of record, the common rule of requiring the best evidence applies.—*Whiting v. Harding*, 15 *Mass. Rep.* 536, 2 *edit.* 504.

It cannot be laid down as a universal rule, that where written evidence of a fact exists, all parol evidence of the same fact must be excluded; for if a promissory note had been given as written evidence of the loan, the action might have been brought for money lent, and this proved by parol.

17. What are the principal ways of impeaching the credit of a witness?

The party against whom a witness is called may disprove the facts stated by him, or may examine other witnesses, as to his general character; but they will not be allowed to speak of particular facts or parts of his conduct.

The regular mode is, to inquire whether they have the means of knowing the former witness's general character, and whether, from such knowledge, they would believe him on his oath.—1 *Phillips on Evidence*, 212.

The credit of a witness may be impeached, by proof that he has made statements, out of court, on the same subject, contrary to what he swears at the trial.—*De Sailly v. Morgan*, 2 *Esp. N. P.*

It has been held that the credit of a witness may be impeached, by showing at the time the facts sworn to have taken place, he was intoxicated.—*Tuttle v. Russell*, 2 *Day*, 201.

A party will not be permitted to produce, in general, evidence to discredit his own witness. The meaning of this rule is, that a party cannot prove his own witness to be of such a general bad character, as would make him unworthy of credit.—1 *Phil. on Ev.* 212, 213.

EVIDENCE OF HAND-WRITING.

1. What is the usual manner of proving a hand-writing

By witnesses who derive their knowledge from having seen the party write, or from authentic papers received in the course of business. If the witness have no previous knowledge of the hand, he cannot be permitted to decide it in court from a comparison of hands.—*Titford v. Nott*, 2 *Johns. Cas.* 211. *Jackson v. Van Duzen*, 5 *Johns. Rep.* 155.

It is a general rule, that evidence by comparison of hands is not admissible, where the witness has had no previous knowledge of the hand-writing, but is called upon to testify merely upon a comparison of hands. There may be cases, where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write. Comparison of hand-writings with documents, known to be in his hand-writing, has been admitted. But these are extraordinary instances, arising from the necessity of the case.—*Strother v. Lucas*, 6 *Peters' S. C. Rep.* 767. *Woodward et al. v. Spiller*, 1 *Dana's Rep.* 180.

ELECTION.

1. Is a purchaser with notice of an annual incumbrance, having prevented the lawful claimant from enjoying the benefit thereof, personally liable to equity to the full value?

He is.—*Blair v. Owles*, 1 *Munford's Rep.* 38.

In such case, the purchaser or the property may be made liable, in the first instance, at the election of the plaintiff.—*Ib.*

EXECUTION.

1. What is execution?

It is putting the sentence of the law in force.—3 *Bl. Com.* 412.

2. What if a *ca. sa.* and *fi. fa.* issue on the same judgment, and at the same time?

The sheriff may proceed successively on both, until he has made the debt.—*Mazyck v. Coil*, 2 *Bailey's S. Ca. Rep.* 101.

3. What if the clerk refuse to issue execution?

The party may move the court for one to issue.—*Commonwealth v. Hewit*, 2 Har. & M'Hen. Md. R. 181.

4. May two executions be issued at one and the same time, against several persons on one judgment?

They may not. *Ewing, Ch. J.*, said, that recognizance was several, and not joint and several. One writ of *scire facias* had been issued, several in its nature; and judgment was rendered against each defendant according to the form and effect of the recognizance. One execution will suffice, and I am unwilling to sanction more than one at the same time.—*The State v. Stout et al.*, 6 Halst. N. J. Rep. 362.

5. Is a contract for the purchase of land, liable to be sold under an execution?

It is not. A person holding a contract for the purchase of land is not now considered as having such an interest in the lands as will be bound by a judgment or decree; and it cannot be sold on the execution. The only remedy for the creditor being in chancery, where the court may order a sale, or a transfer for the benefit of the creditor.—*Jackson v. Scott*, 18 Johns. N. Y. Rep. 94. *Jackson v. Parker*, 9 Cowen's Rep. 73. N. Y. R. Stat. vol. 1, p. 744, § 4, 5, 6.

Bank shares, or shares in a public library, cannot be sold under an execution.—*Denton v. Livingston*, 9 Johns. N. Y. R. 96.

When goods sufficient to satisfy the judgment are seized on a *fieri facias*, the debtor is discharged, even if the sheriff waste the goods, or misapply the money arising from the sale, or does not return his execution, for by a lawful seizure the debtor has lost his property in the goods. But the law is different in an extent on lands.—*Ladd v. Blunt*, 4 Mass. Rep. 402.

An agent's authority to discharge from custody on execution must be clearly proved and strictly pursued. And an attorney of record cannot discharge without payment of debt.—*Crary v. Turner*, 6 Johns. N. Y. Rep. 51. *Jackson v. Bartlett*, *Ibid*, 361.

6. In what is the nature of an attachment against a sheriff for contempt, for not paying over money collected on execution?

It partakes of the nature of a criminal process, but if there is neither delay nor loss, the sheriff may have the attachment set aside on doing what he ought to have done in the first instance.—*Ex parte Thurmond*, 1 Bailey's S. C. Rep. 646.

A sheriff's endorsement of the time when he received an execution, will conclude him in respect to the creditors.—*Williams v. Lowndes*, 1 Hall's N. Y. Rep. 579.

A sheriff was sued for the misconduct of his deputy in the execution of the duties of his office; and being released by the sheriff, he was held admissible as a witness.—*Turner v. Austin*, 16 Mass. Rep. 184.

7. In what case may the plaintiff sue out a writ of *scire facias* against the bail; and what is its effect?

When a *capias ad satisfaciendum* is sued out, and a *non est inventus* is returned thereon. As to its effect, it compels payment from the bail.—3 *Black. Com.* 416, 417.

8. When the plaintiff's demand is satisfied, what ought to be entered on the record?

Satisfaction.—*Ibid*, 421.

9. But within what time must all these writs be sued out?

Within a year and a day after the judgment is entered.—*Ibid*, 421.

A appeal from, or supersedeas to an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only.—1 *Munf. Rep.* 269.

A writ of *fi. facias* against an administratrix, to be levied as to certain damages and costs of the goods and chattels of her intestate, and as to other damages and costs of her own goods and chattels, was returned executed on certain slaves, the property of the administratrix, and a forthcoming bond taken, &c. The bond being given by the administratrix, *eo nomine*, but expressly that the *fi. fa.* was against the goods and chattels of the said administratrix, was decided to be variant from the *fi. fa.* and therefore quashed.—*Glascock's Ads. v. Dawson, Ibid*, 605.

A plaintiff, by directing the sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer it to remain in the possession of the principal defendant, or his securities, releases the securities altogether from that or any subsequent execution; such direction being given without their concurrence.—*Bullit's Exrs. v. Winston, ibid*, 269.

EXECUTOR.

1. What is a testament defined to be?

It is defined to be a legal declaration of a man's intentions, which he directs to be performed after his death.—*McGee v. McGants*, 1 *McCord's S. Ca. Rep.* 522. 2 *Ibid*, 520. *Milledge v. Lamar*, 4 *Des.* 623. *Lyles v. Lyles*, 2 *Nott & McCord*, 531.

2. May parol evidence be given to show a mistake in a will?

It may not. Ch. Kent says: "That from *Cheney's Case* (5 Co. 68) down to this day, it has been a well settled rule, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of the will, nor to explain the intention of the testator, except in two specified cases; where there is a latent ambiguity arising *dehors* the will as to

the person or subject meant to be described; and to rebut a resulting trust."—*In Rothmaler v. Myers et al.*, 4 Dess. 215, held by the highest court in S. C. that even the person who drew the will, could not be admitted to support a mistake in the will.—*Mann et al. v. Exrs. of Mann*, 1 Johns. N. Y. Ch. Rep. 231. *Avery v. Chapels*, 6 Conn. Rep. 270.

3. What is an executor defined to be?

An executor is one whom the testator appoints to execute the trusts confided to him by the will.

All persons, it seems, may be appointed executors. Even an infant and a child in *ventre de sa mere*. So a *feme covert* is also capable of the office of an executrix, but it must be with the consent and concurrence of her husband. Neither poverty nor insolvency will be a disqualification of him in whom the testator has chosen to repose confidence. Should, however, such executor fail in complying with the provisions of the law in respect to security, the court will vacate the appointment.—*Swift v. Duffield*, 5 Serg. & Rawle, Penn. Rep. 40. *Higginson v. Fabra's Exrs.* 3 Dess. Rep. 93, 94. 1 Cranch 259. *Fenwick v. Sears' Adm.*, 3 *Ibid*, 315.

4. To what time must the question in respect to the capacity of the testator be confined?

It relates exclusively to the time when the will was made: and though evidence before and after is admitted, it is received only to show his state of mind at that time.—*Kinne v. Kinne*, 9 Conn. Rep. 86.

5. What if an executor die before the will is proved?

The executor of such executors cannot prove it; nor take upon himself the execution of the will of the first testator.—*Dayton's Will*, 4 *McCord's S. Ca. Rep.* 46.

6. What is the rule as to the liability of joint executors for each other's acts?

That where two or more executors give a joint and several bond, conditioned for the faithful administration of their trust, they are responsible for each other's acts, during the joint executorship. But, at common law, one executor is not liable for waste committed by a co-executor.—*Brazier v. Clarke*, 5 Pick. Mass. Rep. 96. *Johnson v. Johnson*, 1 *Bailey's Rep.* 601.

An executor is liable for the amount of a debt of the testator in conjunction with his co-executor, to whom he had paid over the money, but who misapplied it.—*Crosse v. Smith*, 7 *East*, 246.

7. Can one of two executors transfer by endorsement a negotiable note, made to the two, in their character of executors?

He cannot. The promisees, not being co-partners, had each but a moiety; one could not, therefore, assign the whole; nor was it competent

for him to assign his moiety.—2 *East*, 104. 3 *B. & P.* 7. *Smith v. Whiting*, 9 *Mass. Rep.* 324.

Each executor has the control of the estate, and may release, pay, or transfer, without the agency of the other ; but a co-executor is only answerable for the assets which come to his hands, and not those in the hands of his companion. So one executor is not chargeable for the *devastavit* of the other. When, however, assets have once come to his possession, he is responsible for the administration of them, even if he deliver them over to his co-executor.—*Douglas v. Satterlee*, 11 *Johns. N. Y. Rep.* 16.

8. What if part only of the executors named in a will qualify ?

When a part only qualify, they have full authority to execute the will—even to convey the real estate which is directed by the will to be conveyed.—*Ogden v. Smith*, 2 *Paige's Ch. Rep.* 195.

9. If a testator directs the sale of land for which he holds a bond for a conveyance, is it not a determination of his election ?

It is ; and controls his representative to require a specific performance.—*Dawson v. Clay's Heirs*, 1 *J. J. Marsh.* 168.

10. What must a distributee prove, to make the administrator liable for negligence in the defence of a suit against him ?

It is not only necessary that he must prove that he was guilty of gross negligence or bad faith, but that the defence they charge him with neglecting to make, would have availed.—*Head v. Perry*, 1 *Monroe*, 257.

11. Are not executors justified by sales at auction in the usual way ?

They are ; but if they depart from this method, and sell at private sale, they are answerable for the full value.—*Cannon v. Jenkins*, *Monroe*, 422.

12. What if an executor buys at his own sale ?

He holds the property, however openly and fairly purchased, at the election of the legatee ; and one who purchases in conjunction with him is subject to the same rule.—*Hester v. Hester*, *Dess. Eq.* 328. *Cannon v. Jenkins*, *Ibid*, 328.

13. In a suit against a widow, administratrix to her deceased husband, to recover a debt due by him, can she be charged with the rent of the house in which they had lived, and which she occupied, or leased out, after his death ?

She cannot.—*Roach v. Hubbard*, *Litt. Sel. Ca.* 235.

14. What if an administrator distributes the fund, and it appears afterwards that there are others entitled to a share thereof ?

He will be liable to them, though he made distribution without a knowledge of their existence.—*Lawrason v. Davenport*, 2 Call, 95.

15. What if executors deposit moneys belonging to the estate, with the same persons as the testator intrusted with his moneys in his lifetime?

They are not liable for a loss sustained by their bankruptcy, although they are not bankers.—*Lord Dorchester v. Earl of Effingham*, Tam. 279.

16. Is not an administrator, in selling slaves, when not necessary for payment of debts, liable for their value at the time of the final decree, and reasonable hire from the time of sale?

He is.—*Larue's Heirs v. Larue's Exrs.*, J. J. Marsh. 159.

17. Can an administrator be made responsible for the loss of property of his intestate, occasioned by his not bringing suit until the act of limitations opposed a bar to recovery?

He cannot; unless he acted with bad faith, and was guilty of fraud, wilful default, or gross negligence.—*Thomas v. White*, 3 Litt. 177.

18. Is an executor made liable for gross neglect, in not recovering a debt, where the party became insolvent?

He is.—*Witherspoon v. M'Calla, Wagner*, 245.

19. What if an executor or administrator omits to plead, and allows judgment to be taken against him by default?

This is not such an unqualified admission of assets as to make him irrevocably chargeable. This court will give him an opportunity of showing the fact.—*Lenoir v. Winn, M'Calla*, 65.

20. Is it not the duty of executors and trustees to keep the trust funds separate and distinct from their private funds?

It is. If they use the trust funds, or mix them with their private funds, they will be made liable for all losses which may arise from their neglect or mismanagement.—*Case v. Abeel*, 1 Paige, 393.

21. Does not an executor, having given his own note for a debt due by the estate, exempt the estate from liability?

It does, and he may be sued in equity, as executor for it.—*Douglas v. Frazer*, 2 M'Cord's Ch. 111.

22. Is an administrator a trustee to creditors and next of kin?

He is, and therefore cannot sell to or purchase from himself. And an administrator, so purchasing, is liable to creditors, to the full value of the property so sold.

And on a bill filed against him by the next of kin, is liable to account to them in like manner.—*White v. Brown*, 2 *Car. Law Repos.* 449.

23. Can an executor, assenting to a legacy of personal property, on failure of assets, pursue the legacy in opposition to the claims of creditors of the legatee, who have obtained judgment against him?

He cannot; but he becomes personally liable himself, in the first instance, after the assets are exhibited.—*Drayton v. Drayton*, 1 *Dessauss.* 557.

24. Is not an executor, making sales and not taking proper security, liable?

He is—the purchaser having become insolvent.—*Ibid*, 567.

25. Is money, admitted by an executor to be in the hands of his partner, in his own, for the purpose of bringing into court?

It is.—*Johnson v. Aston*, 1 *Sim. & Stu.* 73.

26. Will an executor, who answers that he has fully administered, be decreed to account, after a lapse of twelve years?

He will not.—*Raynor v. Pearsall*, 3 *Johns. Ch.* 578, 586.

27. Is an executor chargeable with imaginary values, or with more than he has received?

He is not, unless there is evidence of gross negligence, amounting to wilful default.—*Osgood v. Franklin*, 2 *Johns. Ch.* 1. *S. C.* 14 *Johns.* 527.

28. Is not an executor liable for the default of a clerk or agent employed in the administration of assets?

He is. But if a testator recommends a particular person to be employed, then the executor is not liable, merely for his default, unless there has also been laches on his part, in not making him account.—*Kilbee v. Sneyd*, 2 *Moll.* 186.

29. If there is a contract for the purchase of land, does it not descend in equity to the heirs of the vendee?

It does, and they may call on the administrator to discharge the contract out of the personal estate, so as to enable the heirs to demand a conveyance from the vendor.—*Champion v. Brown*, 6 *Johns. Ch.* 402.

30. What if an administrator sells leasehold property belonging to the estate of the testator, upon credit, without taking proper security?

Then he will be liable for a loss arising from the insolvency of the purchaser.—*Orcut v. Orms*, 3 *Paige*, 459.

31. What is generally necessary to ground an action to charge an executor for a default ?

It is not only the fact must be put in issue, but some case be made by evidence, to show the fact is probable, and the inquiry proper.

But if that has not been done, and no direction is originally given, yet if it appears, from the fact stated in the report, that the testator's estate might have been made more available, with reasonable diligence on the part of the executor, the court will apply itself to that, on further directions, but it must point the further inquiry to specific items.—*Travers v. Townsend*, 1 *Moll.* 496.

32. What if an executor suffers the family of his testator to take possession of the property, and to convert any part improperly to their own use ?

Then he is liable for it, they being regarded as his agents.—*Wright v. Wright*, 2 *M' Cord's Ch.* 299.

33. Will not one who is both administrator and guardian, be deemed to hold the assets in the former capacity, where no change in the manner of holding appears ?

He will, and his sureties, as administrator, will alone be chargeable.—*Johnson v. Fuquay*, 1 *Dana*, 514.

34. What if the executors of a purchaser, under a decree, refuse to pay the purchase money ?

Then they cannot be compelled to pay it, unless a suit be instituted by the heir.—*Lord v. Lord*, 1 *Sim.* 503.

35. Where the writ is issued against the executor, at the instance of a legatee, must it not be marked for the whole amount of what is due ?

It must, not only to the plaintiff, but to other persons.—*Parmell v. Taylor*, *Tur. & Russ.* 100.

36. Are executors and administrators liable for each other's acts ?

They are not, unless there be connivance, or gross negligence.—*Le-noir v. Winn*, 4 *Dessauss.* 65.

37. Is one administrator liable for moneys received by the other ?

He is not.—*Roach v. Hubbard*, *Litt. Sel. Ca.* 235.

38. Is one executor liable for the devastavit of his co-executor ?

He is not, if he did not know and assent to it at the time. Each executor is liable for his own acts only ; unless he hands over the money received by him, to his co-executor, or joins in the misapplication of them.—*Sutherland v. Brush*, 7 *Johns. Ch.* 22.

39. Are executors accountable to distributees for the acts or receipts of each other, as to the undivided surplus ?

They are not, either at common law, or on their statutory bond.

But, for legacies, executors are all accountable for each other, on their joint bond, under the statute.—*South's Heirs v. Hoy's Heirs*, 3 Mon. 95.

40. Is an executor decreed to account for moneys which he might, but for his own wilful negligence and default, have received ?

He is not, unless a case of wilful negligence and default is alleged in the bill.

Consequently, where such a charge is omitted, evidence to the point would be impertinent matter.—*Chitty's Eq. Ind.* 767, 769.

41. Is a party who is executor in trust, or administrator in trust, capable of being examined ?

He is not.—*Bellow v. Russel*, 1 B. & P. 99.

The question of interest may always be raised against the evidence of a party produced under such an order : in the equity suit, most conveniently at the hearing, in the issue, on the *voire dire*.—*Murry v. Shadwell*, 2 V. & B. 406. *Piddock v. Brown*, 3 P. Wms. 388.

42. What if an administrator has delivered over the property to the next of kin, or has delivered part and wasted part, so as not to be able to pay the debt ?

Then the property may be followed into the hands of the next of kin, although the administrator has wasted more of the assets than the debt amounts to.—*Atkinson v. Farmer*, 2 Mur. 291.

43. Is interest chargeable on the annual balances in an executor's accounts ?

It is, unless such balances are necessarily kept in his hands for the purposes of the estate.—*Darrel v. Eden*, 3 Dessausure, 341. *Prewett v. Prewett*, 4 Bibb, 266.

44. Is an executor chargeable with interest in all cases where he has received it ?

He is ; and also, where paper money or specie remained in his hands more than a reasonable time, (which was said in this case to be six months,) without being applied to the purposes of the estate.—*M'Call v. Peachy's Admrs.* 3 Munf. 288.

45. If an executor or administrator allow the trust moneys to lie idle, is he not chargeable with simple interest only ?

He is ; if he uses the funds, he is chargeable with compound interest.—*Schieffelin v. Stewart*, 1 Johns. Ch. 620.

EXECUTOR *DE SON TORT*.1. What will constitute an executor *de son tort*?

The taking of goods of an intestate, or any intermeddling therewith by a stranger, will, as respects creditors, make him executor *de son tort*, and chargeable at least so far as assets have come to his hands.—*Howell's Admrs. v. Smith*, 2 *M'Cord's S. Ca. Rep.* 516. *Stockton v. Wilson*, 3 *Pa. Rep.* 129.

Taking out letters of administration will legalize acts before tortious; it will not, however, have any effect upon an action commenced against him as executor *de son tort*, before the granting of such letters of administration.—*Battoon's Case*, 8 *Johns. N. Y. Rep.* 126.

Whether a person be an executor in his own wrong, is a question not to be left to the jury, but is a conclusion of law from the facts proved in the case.—*Nass v. Vansweringen*, 7 *Serg. & Rawle*, 192.

2. May an executor *de son tort* plead *no assets*?

He may not; when an action is brought against an executor *de son tort*, if the estate with which he has intermeddled be insolvent, it is no defence that he has paid debts to double the amount of assets by him received.—*Neal v. Baker*, 2 *N. Hamp. Rep.* 477.

3. What if administration be granted to a wrong person?

It is only voidable; but where in a wrong county, it is void; so, when granted to one when it should be to another, the facts of the former are good; but when granted to one when there is a lawful executor, such administrator's acts are void. So, if there be a will, though concealed, and an administration repealed, it does not avoid acts done under it. In this respect we adopt the English law.—*Holyoke v. Haskins*, 5 *Pick. Mass. Rep.* 201. *Collins v. Turner*, *Taylor's N. Ca. Rep.* 105.

The appointment of an administrator, during the absence of an executor under no disability, is essentially nothing more than the appointment of an agent for that executor. This the ordinary has not the power to do; the executor alone can appoint his agents.—*Forde v. Travers*. *Griffeth v. Frazier*, 8 *Cranch's U. S. Rep.* 9.

OF FOREIGN ADMINISTRATIONS.

1. What was the general rule of the Roman law, as to the succession of estates?

The title *heirs* was indiscriminately applied to all persons who were called to the succession, whether they were so called by the act of the party, or by operation of law. Thus, the person who was created universal successor by a will, was called the testamentary heir (*haeres factus*),

and the next of kin by blood in cases of intestacy, was called the heir at law (*haeres natus*), or heir of intestacy.

The heirs whether consisting of one or more persons, and whether testamentary, or by intestacy, were entitled by succession to all the estate of the deceased, whether it was real or personal, and were chargeable with all the debts and burthens due from him. But as much as the succession in either case might be onerous, as well as profitable, the law allowed the heir whether he were so by testament, or by law, to renounce it, if he pleased; or he might accept it with the benefit of an inventory, the effect of which was to exonerate the heir from any further liability than the amount of the assets, or property inventoried.—1 *Domat*, b. 1, tit. 1, § 5, n. 3, 4, 593.

2. What is the distinction between an executor under the common law, and a testamentary heir under the civil law, and between an administrator and the heir by intestacy?

The principal distinction between them is, that executors and administrators have no right except to the personal estate of the deceased; whereas the Roman heir was entitled to administer both the real and personal estate, and all the assets were treated as of the same nature, without any distinction of equitable and legal assets.—1 *Browne, Civil Law*, 344. *Ibid.* 419.

The heir, testamentary or by intestacy, of immovable property, can take only according to the *lex loci rei*, or in other words, he is not admissible as heir, so as to administer the estate in any foreign country, unless he is duly qualified according to the principles and forms of the local law.—3 *Kames' Eq.*, b. 3, ch. 8, § 3, p. 332. *Vattel*, b. 2, § 109, 110, 111. 1 *Boullenois*, 242. *Id. Pr. Gen.*, 37, p. 9. *Doe dem. Lewis v. M'Farland*, 9 *Cranch*, 151. *Ibid.* 418.

In this respect he does not differ, either in regard to rights or responsibilities, from an heir or devisee, chargeable at the common law or by statute with the bond debts of the ancestor or testator.—*Story on Conflict of Laws*, 418.

3. By what law is the power to sell immovable property, governed?

A power to sell immovable property, given to an executor, cannot be executed, unless upon due probate of the will in the place where the property is situate, and showing that it may be lawfully done by the *lex loci rei sitæ*. And if the party claims not under a power, but as a devisee, in trust to sell for the payment of debts, it is also necessary to have a like probate of the will.

But it is not necessary in the latter case to take out letters of administration, although the devise in trust be to the party by the description of executor; for in such cases he takes as devisee, and not as executor, and his title is under the will, and not under the letters testamentary.—*Doe dem. Lewis v. M'Farland*, 9 *Cranch*, 151. In regard to the title of executors and administrators, derived from a grant of administration in the country of the domicile of the deceased, it is to be considered, that that title

cannot, *de jure*, extend beyond the territory of the government which grants it, and the movable property therein.

As to such property, situate in foreign countries, the title, if acknowledged at all, is *ex comitate*; and of course it is subject to be controlled or modified, as every nation may think proper, with reference to its own institutions and policy, and the rights of its own subjects. And, here, the rule, to which reference has been so often made, applies with great force, that no nation is under any obligation to enforce foreign laws, prejudicial to its own rights, or those of its subjects.—*Story on Conflict of Laws*, 421.

4. What is the rule, where a person dies, leaving personal assets in a foreign country, and is also indebted in that country?

That his executor cannot withdraw those funds, without paying the debts.

In such cases, it would be a great hardship upon such creditors, to allow a foreign executor or administrator, to withdraw those funds, without the payment of such debts, and thus to leave the creditors to seek their remedy in the domicile of the foreign executor or administrator. Hence it has become a general doctrine of the common law, recognized both in England and America, that no suit can be brought by or against any foreign executor or administrator, in the courts of the country, in virtue of his foreign letters testamentary, or of administration. But now letters of administration must be taken out, and new security given, according to the general rules of law prescribed in the country where the suit is brought.

The authorities to this point are now exceedingly numerous and entirely conclusive.—*Lee v. Moore*, *Palmer's Rep.* 163. *Tourton v. Flower*, 3 *P. Will.* 369, 370. *Thorne v. Watkins*, 2 *Ves.* 35. *Attorney General v. Cockerell*, 1 *Price's Rep.* 179. *Lowe v. Fairly*, 2 *Madd. Rep.* 101. 1 *Hagg. Eccl. Rep.* 93, 239. *Mitford's Plead.* 177 (4th edit.). *Fenwick v. Seares*, 1 *Cranch*, 259. *Dixon's Executors v. Ramsey's Executors*, 3 *Cranch*, 319, 323. *Kerr v. Hoon*, 9 *Wheaton's Rep.* 565. *Armstrong v. Lear*, 12 *Wheaton's Rep.* 169. *Thompson v. Wilson*, 2 *N. Hamp. Rep.* 291. *Dickinson's Admrs. v. McCraw*, 4 *Randolph's Rep.* 158. *Glenn v. Smith*, 2 *Gill. & Johns. Rep.* 493. *Stearns v. Burnham*, 5 *Greenlf. Rep.* 261. *Goodwin v. Jones*, 3 *Mass. Rep.* 514. *Borden v. Borden*, 5 *Mass. Rep.* 67. *Stevens v. Gaylord*, 11 *Mass. Rep.* 256. *Langdon v. Potter*, 11 *Mass. Rep.* 313. *Dangerfield v. Thurston*, 20 *Martin's Rep.* 232. *Riely v. Riely*, 3 *Day's Conn. Cas.* 74. *Champlin v. Tilley*, *Id.* 303. *Trecothick v. Austin*, 4 *Mason's R. M.* 16, 32. *Ex parte Picquet*, 5 *Pick.* 65. *Homes v. Remson*, 20 *Johns. Rep.* 229, 265. *Smith's Adm. v. The Union Bank of Georgetown*, *Peters' Rep.* 518. *Campbell v. Tousey*, 7 *Cowen's Rep.* 64. *Logan v. Fairleg*, 2 *Simon & Stuart*, 284. *Story on Conflict of Laws*, 222.

5. What is understood by the term ancillary administration?

It is where an original administrator, or some other person, takes out

a new administration in a foreign country to administer assets therein situated. And the right of the foreign executor, or administrator, to take out such new administration, is usually admitted, as a matter of course, unless some special reasons intervene.—*Story on Conflict of Laws*, 422. *Harvey v. Richards*, 1 *Mason's Rep.* 381. *Stevens v. Gaylord*, 11 *Mass. Rep.* 256. *Case of Miller's Estate*, 3 *Rawle's Rep.* 312. Still, however, the new administration is made subservient to the rights of the creditors, legatees, and distributees, resident within this country; and the residuum is transmissible to the foreign country only, when the final account has been settled in the proper domestic tribunal, upon the equitable principles adopted in its laws.—*Daves v. Boylston*, 9 *Mass. Rep.* 337. *Selectmen of Boston v. Boylston*, 4 *Mass. Rep.* 318, 384. *Richards v. Dutch*, 8 *Mass. Rep.* 506. *Daves v. Head*, 3 *Pick. Rep.* 128. *Hooker v. Olmstead*, 6 *Pick. Rep.* 481. *Davis v. Eaty*, 8 *Pick.* 475. *Jennison v. Hapgood*, 10 *Pick. Rep.* 77. *Stephens v. Gaylord*, 11 *Mass. Rep.* 256. *Case of Miller's Estate*, 3 *Rawle*, 312. *Story's Conflict of Laws*, 423.

6. What is the rule where a foreign executor or administrator comes into another state and collects property on debts which are assets there, and does not take out an ancillary administration ? ~~~

That he is liable to be treated as an executor *de son tort*, to the extent of such assets. And in such case, if he has brought the assets collected abroad with him into such state, it has been decided in New-York, that he is chargeable with all the assets received abroad, which he still retains in his hands, or which he had expended, or disposed of in such state, unless expended or disposed of in the due course of administration.

Whether they were received in such state, or in the foreign country. There is great difficulty in supporting this decision to the extent of making the foreign executor or administrator liable in such state for assets received abroad, and brought into the state by him. If he cannot sue in his representative character in another state, without new letters of administration, because he derives his authority from a foreign government, to which he is solely responsible in his administration, it is not easy to perceive, how he can be sued in such state for assets in his hands, received abroad under the sanction of the foreign administration, and by the authority of the foreign government, to which he is accountable for all such cases.—*Doolittle v. Lewis*, 7 *Johns. Chan. Rep.* 45, 47. *Contra*, *Logan v. Fairlie*, 2 *Simon & Stuart's Rep.* 384. *Story on Conflict of Laws*, 425—431.

7. What is the effect of an assignment of a negotiable note or bill of exchange, by a foreign executor, in a foreign country ?

It invests the full legal title in the assignee. The decision, in a recent case, in the Supreme Court of the United States, is founded upon the doctrine, that the assignment by an executor of a *chose in action* in the state where he is appointed, and which is good by its laws, will enable the assignee to sue in his own name in any other state, by whose laws the instrument would be assignable so as to pass the note to the assignee, and enable him to sue thereon.—*Harper v. Butler*, 2 *Peters' S. C. Rep.* 239.

8. How do administrators stand towards each other where their powers are granted in different states?

They are deemed so far independent of each other, that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator.—*Lightfoot v. Bickley*, 2 *Rawle's Rep.* 431. It might be different, if the same person were administrator in both states.—*Story's Conflict of Laws*, 436.

9. Suppose a case, where the personal estate of the deceased has not, at the time of his decease, any positive locality in the place of his domicile, or in any foreign territory; but is strictly *in transitu* to a foreign country, and afterwards arrives in the country of its destination. It may be asked, in such a case, to whom would the administration of such property rightfully belong? Would it belong to the administrator in the place of the domicile of the deceased, or to the administrator appointed in the place where it had arrived? And if, (as may well happen in case of a ship and cargo sent abroad,) the property or its proceeds should return to the domicile of the original owner, would the administrator, there appointed, be entitled to take it, and bound to account for it, in the due course of administration?

Practically speaking, no doubt is entertained on this subject; ships and cargoes and the proceeds thereof, locally situated in a foreign country at the time of the death of the owner, always proceed on their voyages, and return to the home port, without any suspicion that all the parties concerned are not legally entitled so to act; and they are taken possession of, and administered by the administrator of the *forum domicilii*.

A case illustrative of these remarks has recently occurred. The personal estate of an intestate consisted in a considerable degree of stage coaches and stage horses, belonging to a daily line, running from one state to another; and letters of administration were taken out by the same person in both states, one being that of the intestate's domicile. A question arose, under which administration the property was to be accounted for, part of it being in one state, and part in the other, and part *in transitu* from one to the other, at the moment of the intestate's death. The learned Chancellor of New-York said that, if administration had been granted to different individuals in the two states, the property must have been considered as belonging to that administrator, who first reduced it to possession within the limits of his own state. But that in the case before him, as both administrations were granted to the same person, if an account of administration were to be taken, it would be necessary to settle that by ascertaining what had been inventoried and accounted for by him under the administration in the other state.—*Orcutt v. Orms*, 3 *Paige, Rep.* 459.

FELONY.

1. What is felony ?

Felony, in the general acceptance of the English law, comprises every species of crime, which occasioned at common law the forfeiture of lands and goods. This most frequently happens in those crimes, for which a capital punishment either is, or was liable to be inflicted ; for those felonies which are called clergyable, to which the benefit of clergy extends, were anciently punished with death, in all lay or unlearned offenders ; though now, by the statute law, that punishment is for the first offence universally omitted.—2 *Com.* 94.

FEUDS.

1. What is the origin of the constitution of feuds ?

From the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium*, as Cragg very justly entitles it, poured themselves in vast quantities into all regions of Europe at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions ; and to that end large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers.—2 *Com.* 45.

FORGERY.

1. What is forgery ?

The fraudulent making or alteration of a writing, to the prejudice of another man's rights.—4 *Com.* 247. The very essence of forgery, is an intent to defraud ; and, therefore, the mere imitation of another's writing, the assumption of a name, or the alteration of a written instrument, where no person can be injured, does not come within the definition of the offence. Most of the statutes expressly make an intent to fraud, a necessary ingredient in the crime ; whether it existed or not, is a question for the jury to determine. But it is in no case necessary that any actual injury should result from the offence.—2 *Stra.* 747. 2 *Ld. Raym.* 1461.

2. Who is to decide the question, as to the intent of a party, on a charge of perjury ?

The jury ; and such jury ought to infer an intent to defraud the person who would have to pay the instrument, if it were genuine, although

from the manner of executing the forgery, or from the person's ordinary caution, it would be likely to impose on him; and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation.—*R. & Ry. C. C.* 291, and see *Id.* 769.

3. Is it necessary to constitute forgery, that there should be an intent to defraud any particular person?

It seems not; a general intent to defraud will suffice.—3 *T. R.* 136. 1 *Leach*, 216.

4. What evidence is necessary to support a charge of forgery by subscribing a fictitious name?

There must be given satisfactory evidence, on the part of the prosecutor, that it is not the party's real name, and that it was assumed for the purpose of fraud in that instance.—*Russ & Ry. C. C.* 260.

Where a prisoner, charged with uttering a forged note to A B, knowing it to be forged, gave forged notes to a boy, who was not aware of their being forgeries, and directed the boy to pay away the notes described in the indictment, at A B's, for the purchase of goods, and the boy did so, and brought back the goods and change to the prisoner; it was held by the twelve judges, an uttering by the prisoner to A B.—*Rex v. Giles, Car. C. L.* 191.

5. Is drawing, endorsing, or accepting a bill of exchange in a fictitious name, a forgery?

It has been so determined.—*Bollan's Case, &c. Leach*, 78, 159, 192. 1 *Hen. Black.* 588. *Fost.* 116.

6. If any person puts his own name to an instrument, representing himself to be a different person of that name, with an intent to defraud, of what is he guilty?

He is guilty of forgery.—4 *T. R.* 28.

7. Where a bill of exchange is endorsed by a person in his own name, and another represents himself to be that person, is he guilty of forgery?

He is not, but it is a misdemeanor.—*Hervey's Case, Leach*, 268.

8. May a bill or note be produced in evidence against a prisoner prosecuted for the forgery of it?

It may, and he may be convicted upon the usual evidence of forgery.—*Leach*, 292—311.

9. What must every indictment for forgery set out?

It must set out the forged instrument in words and figures.—*Mason's Case*, 1 *East*, 182.

But it is sufficient to set forth the receipt at the bottom of an account, without setting out the account itself.—*Testick's Case*, *Ibid*, 181. The word purport, in an indictment for forgery, signifies the substance of an instrument, as it appears on the face of it; tenor means an exact copy of it.—*Ibid*, 180. *Leach*, 753.

See a complete collection of the acts of Parliament, relating to the crime of forgery in England, (too numerous even to abstract here,) in *Collyer's Crim. Stat.* 142, *et seq. with the notes thereon*.

10. If a bill of exchange, payable to A or order, get into the hands of another person of the same name as the payee, and such person knowing he is not the real person in whose favor it was drawn, endorse it, of what is he guilty?

He is guilty of forgery.—*Mead v. Young*, *Mich.* 31, *Geo.* 3. 4 *Durn. & East*, 28.

11. Are the makers of the paper and plate respectively, for the purpose of forging a note, afterwards filled up by a third person, principals in the forgery with that person?

They are, though each executed his part in the absence of the others, and without knowing by whom the other parts are executed.—*Rex v. Dade*, *M. C. C. Rep.* 307.

12. Is it forgery to alter a document which prisoner had previously forged himself?

It is, and he may be convicted of forging and uttering it in the state to which it was so altered.—*Rex v. Kinder*, 2 *East*, *P. C.* 856.

If there be two persons of the same name, but of different descriptions or additions, and one signs his name with the description or addition of the other, for the purpose of fraud, it is forgery.—*Rex v. Webb, Bailey on Bills*, 432.

13. Is the maker of a promissory note, who utters it as the note of another person, and thereby obtains superior credit, guilty of forgery, within the statute 2 *Geo.* 2, c. 25, § 1?

He is.—*Leach's Criminal Cases*, 61.

FRAUD.

1. What is fraud?

Deceit in grants and conveyances of lands, and bargains and sales of goods, &c., to the damage of another person, which may be either by suppression of the truth, or suggestion of a falsehood.

It may be laid down as a general rule, that without the express provi-

sion of any act of parliament, all deceitful practices in defrauding, or endeavoring to defraud another of his known rights, by means of some artful device, contrary to the plain rule of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence.—*Cò. Litt.* 3 *b.* *Dyer*, 295. Such as causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written, &c.—1 *Sid.* 312, 431.

2. Is not fraud, in many instances, cognizable in a court of law ?

It is. Thus, for example, although fraud, accident and trust, are proper objects of courts of equity, it is by no means true, that they are exclusively cognizant therein. On the contrary, fraud is, in many cases, cognizable in a court of law. Thus, for example, reading a deed falsely to an illiterate person, whether it be so read by the grantee or by a stranger, avoids it, as to the other party, at law. And sometimes fraud, such as fraud in obtaining a will, or devise of lands, is exclusively cognizable there.—1 *Hovenden on Frauds, Int.* p. 16. *Id.* ch. 10, p. 252. 1 *Dane, Abridge.* ch. 7, art. 1 § 3. 3 *Woodes. Lect.* 56. p. 477. 1 *Storry's Com. on Eq. Jurisp.* 68.

Many cases of accident are remediable at law, such as losses of deeds, mistakes in accounts and receipts, impossibilities in the strict performance of conditions, and other like cases. And even trusts, though in general of a peculiar and exclusive jurisdiction in equity, are sometimes cognizable at law ; as, for instance, cases of bailments, and that larger class of cases, where the action for money had and received for another's use, is maintained *ex equo et ex bono*.—3 *Blac. Com.* 431, 432. 1 *Woodes. Lect.* 7, p. 208, 209.

3. Are there not cases of fraud, of accident, and of trust, which neither courts of law, nor of equity, presume to relieve or mitigate ?

There are ; thus, a man may most unconscientiously wage his law in an action of debt ; and yet the aggrieved party will not be relieved in any court of law or equity.—*Francis, Max. Int.* 6, 7.

4. May not a man by accident omit to make a will, appointment, or gift, in favor of some friend or relative, or leave his will unfinished, and yet the court of equity give no relief ?

Such may be the case.—*Whitton v. Russel*, 1 *Atk.* 448, 449. 1 *Madd. Ch. Pr.* 39. *Id.* 45, 46. 1 *Woodes. Lect.* 7, p. 214. *Com. Dig. Chancery*, 3 *F.* 8. 1 *Fonbl. b.* 1, ch. 3, § 7, note (x.) *Francis, Max. M.* 9, § 4 ; and many cases of the non-performance of conditions precedent, are equally without redress.—1 *Madd. Ch. Pr.* 35. *Popham v. Bamf.* 1 *Vern. R.* 83. *Lord Falk. v. Bertie*, 2 *Vern.* 333. 7 *Dane's Abridg.* ch. 225, art. 4, § 6. So cases of trust may exist, in which the parties must abide by their own false confidence in others, without any aid from courts of justice. Thus in cases of illegal contracts, or those in which one party has placed property in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds, and fraud-

ulently or unjustly withholds them, the former must abide by his loss; for, *in pari delicto melior est conditio possidentis, et defendentis*, is a maxim of public policy equally respected in courts of law and courts of equity. *Holmon v. Johnston*, *Cowper's R.* 341. *Armstrong v. Toler*, 11 *Wheat. R.* 258. *Hanney v. Eve*, 3 *Cranch's R.* 242. *Grounds & Rudim. of the Law*, M. 347, p. 260, edit. 1751. 7 *Dane's Abridg.*, ch. 226, art. 18. *Smith v. Bromley*, *Doug. R.* 696, note. 1 *Story's Com. on Eq. Jurisprudence*, 69, 70, and note (1) on p. 70.

On the other hand, where the fraud is perpetrated by one party only, still if it involves a public crime, and redress cannot be obtained except by a discovery of the facts from him personally, the law will not compel him to accuse himself of a crime, and therefore the case is one of irremediable injury.—*Grounds & Rudim. of the Law*, Intro. 6, 7. 1 *Id. M.* 306, p. 225, edit. 1751. 2 *Fonbl. Eq.*, b. 6, ch. 3, § 5, note (2), p. 70. *Story's Eq. Jurisprudence*.

5. If an heir at law should, by parol, promise his father to pay his sisters' portions, if he would not direct timber to be felled to raise them, although discharged at law, would he not in equity be deemed liable to pay them, in the same way as if they had been charged on the land?

He would.—*Dalton v. Poole*, 1 *Vent. Rep.* 318. And many cases of a like nature may be cited.—1 *Ponbl. Eq.*, b. 1, ch. 3, § 4. *Hobbs v. Norton*, 1 *Vern. R.* 135. *Neville v. Robinson*, 1 *Bro. Ch. C.* 543. *Devenish v. Baines*, *Pre. Ch.* 3. *Olaham v. Litchfield*, 2 *Freem. Rep.* 284. *Thynn v. Thynn*, 1 *Vern. R.* 296. 11 *Ves.* 638, 639. *Gilb. Lex. Prætor.* 336. *Sugdon on Vendors* (7th edit.), p. 717, 718. 3 *Woodes. Lec.* 59, p. 479—482. *Id.* 486, 490, 491, n. (2). 1 *Story's Eq. Jurisprud.* 73.

6. Does not equity, in cases of equitable titles in land, require relief to be sought within the same period in which an ejectment would lie at law?

It does; and in cases of personal claims, it also requires relief to be sought within the period prescribed for personal suits of a like nature.—*Blanshard on Limit.*, ch. 4, p. 61. *Edsell v. Buchannan*, 1 *Ves. R.* 83. *Com. Dig. Ch.* 1. *Mitford's Pl. Ev.* 369—274. 1 *Madd. Ch. Pr.* 79, 80. 2 *Ibid.* 244. *Smith v. Clay*, 2 *Bro. Ch. R.* 640, note. *Cholmondeley v. Clinton*, *Jac. & Walk.* 156.

And yet there are cases in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief; and on the other hand, there are cases where the statutes would not be a bar at law, but where equity, notwithstanding, would refuse relief.—*Pickering v. Lord*, *Stamford*, 2 *Ves.*, Jr., 289. *Idem*, 582. 2 *Madd. Ch. Pr.* 244—247. *Mitford's Pl. Eq.* 260—274. *Blanshard on Limit.*, ch. 4, p. 61, 81, 82, 83. 1 *Fonbl. Eq.*, b. 1, ch. 4, § 27, n. (q.). *Stackhouse v. Barnestown*, 10 *Ves.* 466. *Bond v. Hopkins*, *Sch. & Laf.* 413. 1 *Fonbl. Eq.*, b. 1, ch. 1, § 3, note (G). *Cowper v. Cowper*, 2 *P. Will.* 753, and note (5). 1 *Story's Eq. Jur.* 73.

But all these cases stand on special circumstances, which courts of

equity can take notice of, when courts of law may be bound by the positive bar of the statutes. And there are many other cases where the rules of law and equity, on similar subjects, are not exactly co-extensive, as to the recognition of rights, for the maintenance of remedy.—*Earl Bath v. Sherwin*, 10 *Mod. R.* 1, 3, *S. C.* 1 *Bro. Parl. C.* 270. *Doct. & Stud. Dial.* 1 *Ch.* 20.

Thus a person may be a tenant, by the courtesy of his wife's trust estate; but she is not entitled to dower in his trust estate.—*Cruise, Dig.*, tit. 12, ch. 2, § 15. 1 *Fonbl. Eq.*, b. 1, ch. 6, § 9, note (T).

So where a power is defectively executed, equity will often aid it; whereas at law the act is wholly nugatory.—1 *Fonbl. Eq.*, b. 1, ch. 1, § 7, and note *ibid.* *Id.*, b. 1, ch. 4, § 25, note (h). 1 *Story's Eq. Jur.*, p. 74, and note (2), same page.

7. Is it not a rule in courts of law and courts of equity, that fraud is not to be presumed?

It is; but it must be established by proofs. In 10 *Coke R.* 56, it is laid down, that covin shall never be intended or presumed at law, if it be not be expressly averred, *Quia odias et inhonesta non sunt in lege præsumentenda, et in facto quod in se habet ad bonum et malum, magis de bono quam de malo præsumentum est.* And this is in conformity to the rule of the civil law. *Dolum ex indiciis perspicuis probary convenit.*—*Cod. Lib.* 2, tit. 21, 1, 6, n. (1). 1 *Story's Eq. Jur.* 199.

8. Will circumstances of mere suspicion, leading to no certain results in either a court of law or a court of equity, be deemed a sufficient ground to establish fraud?

They will not.—*Trenchard v. Wanley*, 2 *P. Will.* 166. *Townsend v. Lowfield*, 1 *Ves.* 35. 3 *Atk.* 534. *Walker v. Symonds*, 3 *Swanst. Rep.* 61. *Bath & Montague's Cases*, 4 *Ch. Ca.* 85. 2 *Madd. Ca. Pr.* 208. 1 *Fonbl. Eq.*, b. 1, ch. 11, § 8. 1 *Story's Equity Jurisprudence*, p. 200, and note [1] same page. On the other hand, neither of these courts insist upon positive and express proofs of frauds; but each deduces them from circumstances affording strong presumptions. But courts of equity will act upon circumstances, as presumptions of fraud, where courts of law would not deem them satisfactory proofs.

In other words, courts of equity will grant relief upon the ground of fraud, established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law. It is in this sense that the remark of Lord Hardwicke is to be understood, when he said, that "fraud may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that fraud must be proved, not presumed."—*Chesterfield v. Janssen*, 2 *Ves.* 155, 156.

And Lord Eldon has illustrated the same proposition by remarking that a court of equity will, as it ought, in many cases, order an instrument to be delivered up as unduly obtained, which a jury would not be justified in impeaching by the rules of law, which require fraud to be proved, and

are not satisfied, though it may be strongly presumed.—*Fullager v. Clarke*, 18 Ves. 483.

9. Is it every wilful misrepresentation, even of a fact, which will avoid a contract upon the ground of fraud?

It is not, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for courts of equity, like courts of law, do not aid parties, who will not use their own sense and discretion upon matters of this sort.—*Trower v. Newcome*, 3 Meriv. R. 704. *Scott v. Hanson*, 1 Simmond's R. 13. *Fenton v. Browne*, 16 Ves. 144. 2 Kent's Comm. lect. 39, p. 484, 485, 2d ed. *Id.* 486, 487, note (b.) *Davis v. Meeker*, 5 Johns. R. 354. *Harvey v. Young*, Yelv. R. 21, and Metcalfe's note. 1 Domatt, b. 1, tit. 2, § 11, art. 11, 12. *Sherwood v. Salmon*, Day's R. 128, (note 1.) *Story's Eq. Jur.* 209.

10. Is it not a constant rule in equity, that where a party is not a free agent, and is not equal to protecting himself, the court will protect him?

It is.—*Evans v. Llewellyn*, 1 Cox, R. 340. *Crome v. Ballard*, 1 Ves. Jr. 215, 220. *Hawes v. Wyatt*, 3 Bro. Ch. R. 158. *Jeremy on Eq. Jur.* b. 3, pt. 2, ch. 3, § 1. 2 Eq. Abr. 183, pl. 2. *Gilbert Eq. R.* 9. 3 P. Will. 294, note (e.) *Attorney-General v. Sothen*, 2 Ver. R. 497.

The maxim of the common law is: *quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur*, 3 Co. R. 78.

On this account courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment; and if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contracts aside.—*Roy v. Duke of Beaufort*, 2 Atk. 190. *Nichols v. Nichols*, 1 Atk. 409. *Hinton v. Hinton*, 2 Ves. 634, 635. *Falkner v. O'Brien*, 2 B. & Beatt. 214. *Griffith v. Speattly*, 1 Cox R. 333. *Underhill v. Harwood*, 10 Ves. 219. *Attorney-General v. Sothen*, 2 Vern. R. 497. 1 *Story's Eq. Jur.* and note (1), 244.

Circumstances also of extreme necessity, and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency, as to justify the court in setting aside a contract made by him, on account of some oppression, or fraudulent advantage, or imposition attendant upon it.—*Gould v. Okeden*, 3 Bro. Parl. R. 650. *Bosanquet v. Dashwood*, Cas. Temp. Talbott, 37. *Proof v. Hines*, Cas. T. Talb. 111. *Hawes v. Wyatt*, 3 Bro. Ch. R. 156. *Picket v. Loggon*, 14 Ves. 215. *Beaseley v. M'Greth*, 2 Sch. & Lef. 31, 35. *Carpenter v. Elliott*, cited 2 Ves. Jr. 494. *Wood v. Abrey*, 3 Mad. R. 417. *Ramsbottom v. Parker*, 6 Mad. R. 6. *Fitzgerald v. Rainsford*, 1 B. & Beatt. R. 37, note (d.) *Underhill v. Harwood*, 10 Ves. 219. 1 Fonbl. Eq. b. 1, ch. 2, § 9, note (e.) *Crowe v. Ballard*, 1 Ves. Jr. 215, 220. *Huguenin v. Basley*, 14 Ves. 273. *Newland on Contracts*, ch. 22, p. 362, etc. *Ib.* 365, etc. 1 *Story on Eq. Jur.* 244, and note (2.)

11. Do not cases of fraud depend much upon the peculiar circumstances of the case?

They do.—*Watkins v. Stockett's Admrs.*, 6 Har. & Johns. Md. R. 435. *Brogden v. Walker*, 2 Ib. 292. *Boering's Lessee v. Singery*, Ib. 455, 487.

In general, it is not a conclusion from a single fact; but a conclusion from all the facts in the case. Hence it is a proper subject for inquiry by a jury in a court of law.

Where the vendor of goods being about to credit the son, made inquiry of the father, by letter, in respect to the truth of the statement made by the son, that he had a capital, his own property; and the defendant made answer, that he (the father) had advanced the capital. It turned out, however, that he had merely lent his son the money, and taken his note with interest. The father was held liable in damages, on the son's becoming insolvent.—8 Bing. 33. 3 B. & Ad. 114.

12. Is not a vendor of goods bound to disclose a latent defect, if known?

He is.—*Hough v. Evans*, 4 M'Cord's S. Ca. Rep. 169.

13. Are not conveyances to defraud creditors, void by common law, as well as by statute?

They are.—*Sands et al. v. Codwise et al.* 3 Johns. N. Y. Rep. 536.

14. May not a deed executed without the knowledge of the grantee, be good?

It may; but it will take effect only from delivery.—*Hood v. Brown*, 2 Ham. Ohio Rep. 357.

15. Is not a voluntary deed, by a person not indebted, good against creditors?

It is.—*Fox v. Hills*, 1 Conn. Rep. 295. *Kimball v. Hutchinson*, 3 Ib. 450. *Beach v. Catlin*, 4 Day's Rep. 284. 5 Ib. 345. *Hinde v. Longworth*, 11 Wheat. U. S. Rep. 199, 210.

16. Is it not for the jury to find facts, in courts of law, in questions of fraud?

It is, and to determine their character.—*Gregg v. The Lessee of Sayre & Wife*, 8 Conn. Rep. 244.

17. May not a conveyance be good in the hands of a bona fide purchaser, though liable to be set aside for fraud?

It may.—*Anderson v. Roberts*, 18 Johns. N. Y. Rep. 515. In error, *Jackson v. Terry*, 2 Ib. 471. *Lessee of Burgett v. Burgett*, 1 Ham. Ohio Rep. 209.

18. Is not leaving goods in possession of the vendor prima facie evidence of fraud?

It is.—*Babb v. Clemson*, 10 *Serg. & Rawle's Rep.* 419. *Show v. Levy*, 17 *Ib.* 99. *Hower v. Geesman*, *Ib.* 251.

And of itself conclusive to avoid the sale.—*Chumar v. Wood*, 1 *Halst. N. J. Rep.* 155. *Boardman v. Keeler*, 1 *Aiken's Vt. Rep.* 158. *Weeks v. Wood*, 2 *Ib.* 64. *Fletcher v. Howard*, *Ib.* 115. *Beattie v. Robbin*, 2 *Vt. Rep.* 181.

19. If the mortgagor of personal property continue in possession, is it not a question for the jury, whether fraudulent or not?

It is. But where a creditor attached cattle, letting them go back to the farm of the debtor, was conclusive to show fraud, unless explained.—*Patton v. Smith*, 4 *Conn. Rep.* 450. *Ingraham v. Wheeler*, *Ib.* 277. *Burrowes v. Stoddard*, 3 *Conn. Rep.* 160.

20. Is not possession unexplained, conclusive to show fraud?

It is.—*Talcott v. Wilcox*, 9 *Conn. Rep.* 134, 140.

21. Is not the conveyance void, where the intent of the parties was to defraud?

It is utterly void.—*Wadsworth v. Marsh*, 9 *Ibid.* 481.

22. May not the vendor of personal chattels hire them of the vendee?

He may, and if the transaction is *bona fide*, the possession is not fraudulent.—*Sydney v. Gee, Sherriff, etc.*, 4 *Leigh's Va. Rep.* 535.

23. Is it not settled that the possession and use of chattels by the vendor, after a transfer, are but evidence of fraud?

It seems so.—*Shumway et al. v. Rutter*, 8 *Pick. Mass. Rep.* 443. *Wheeler v. Train*, 3 *Ib.* 355. *Gould v. Ward*, 4 *Ib.* 104.

24. Can a vendee of real estate object to the payment of a note, on the ground that the conveyance was made to defraud creditors?

He cannot.—*Findley v. Cooper*, 1 *Bluck. Ind. Rep.* 262. *Greenleaf v. Cooke*, 2 *Wheat.* 13

25. Can a creditor, who has knowledge of a conveyance, take advantage on account of its not being registered?

He cannot.—*State of Connecticut v. Bradute*, 14 *Mass.* 296. *Foster v. Woods*, 16 *Ib.* 116. *Priest v. Rice*, 1 *Pick.* 164.

26. Can the right in equity be passed, by parol, in redeeming mortgaged lands?

It cannot.—*Scott et al. v. M'Farland*, 13 *Mass. R.* 309.

27. Is parol evidence admissible, to show that the actual consideration is different from that stated in the deed ?

It is not.—*Griswold v. Messenger*, 6 *Pick. Mass. Rep.* 517.

28. Where a person purchases with full notice of the legal or equitable title of other persons to the same property, will he be permitted to protect himself against such claims ?

He will not ; but his own title will be postponed and made subservient to theirs.—*Com. Dig. Chancery*, 4, O. 1. *Sugden on Vendors*, ch. 16, § 5, 10 ; ch. 17, § 1, 2. An admitted exception, (which is more fully adverted to in a subsequent note,) is the case of a dowress. A person, purchasing with a notice of her title, may yet, by getting in a prior legal title or term, protect himself against her title. This is an anomaly ; but it is now so firmly established, that it cannot be shaken.—*See Swannack v. Lefford*, *Amber's Rep.* 6, and *Mr. Blunt's note*, and the note of Lord Hardwick's Judgment in *Co. Litt.* 208, a. *Radnor v. Vanderberdy*, *Show, Parl. Cas.* 69. *Maundrell v. Maundrell*, 10 *Ves.* 271, 272. *Winn v. Williams*, 5 *Mass. Rep.* 130. *Male v. Smith*, *Jacobs' Rep.* 497. 1 *Story's Commentaries on Equity Jurisprudence*, p. 383, and note (2.) same page.

Mr. Justice Story says, it would be a gross injustice to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes, by such conduct, a *particeps criminis* with the fraudulent grantor ; and the rule of equity, as well as of law, is, *dolis et fraus nemini patrocinari debent*.—2 *Fonblan. Eq. b. 2, ch. 6, § 3.* 3 *Co. Rep.* 78. 1 *Story's Commentaries on Equity Jurisprudence*, 384, and note (3.) same page.

29. Will not courts of equity in all such cases of purchases with notice, hold the purchaser a trustee for the benefit of the persons whose rights he has thus sought to defraud or defeat ?

They will.—1 *Fonbl. Equity, b. 2, ch. 6, § 2.* *Munley v. Ballou*, 1 *Johns. Chan. Rep.* 566. *Murray v. Finster*, 2 *Johns. Chan. Rep.* 158. *Maundrell v. Maundrell*, 10 *Ves.* 260, 261, 270. 1 *Story's Equity Jurisprudence*, 384, and note (4.) same page.

50. Suppose title deeds should be deposited as a security for money, (which would operate as an equitable mortgage,) and a creditor, knowing the facts, should subsequently take a mortgage of this same property, would he, or would he not be postponed to the equitable mortgage of the prior creditors ? May, or may not a purchaser by an incumbrance, lay hold on any plank to protect himself ?

The answer to the two above questions may be found on page 384, 1 *Story's Commentaries on Equity Jurisprudence*.

31. In countries where the registration of conveyances is required, in order to make them perfect titles against subsequent purchases, if a subsequent purchaser has notice at the time of his purchase of any prior

unregistered conveyance, will he be permitted to avail himself of his title against that prior conveyance?

He will not.—*Sugden on Vendors*, ch. 16, § 5, 10; ch. 17, § 1, 2. 1 *Fonbl. Eq.*, b. 1, ch. 1, § 3, note (h.) 1 *Madd. Ch. Pr.* 260. *Bushell v. Bushell*, 1 *Sch. & Lefr.* 99—103. *Eyre v. Dolphin*, 2 *B. & Beatt.* 302. *Blades v. Blades*, 1 *Eq. Abridg.* 358. *Worsley v. De Mottos*, 1 *Burr.* 474, 475. *Forbes v. Dennister*, 1 *Bro. Parl. Cas.* 425. *Sheldon v. Coxe*, 2 *Eden Rep.* 224. *Le Neve v. Le Neve*, 3 *Atk.* 646. *S. C.* 1 *Ves.* 64. *Ambr.* 436. *Chandos v. Brownlow*, 2 *Ridg. Parl. R.* 428. *Bean v. Smith*, 2 *Mason's Rep.* 285. *Coppinger v. Ferryhough*, 2 *Bro. Chan. Rep.* 291. *Sugden on Vendors*, ch. 16. 1 *Story's Comm. on Equity Jurisprudence*, 385, and note (1.) same page.

This has been long the settled doctrine in courts of equity, and it is often applied in America, though not in England, in courts of law, as a just exposition of the registry acts.—*Doe d. Robinson v. Alsop*, 5 *Barn. & Ald.* 142. *Norcross v. Widgery*, 2 *Mass. Rep.* 506. *Biglow's Dig. Conveyance*, P. and note. *Jackson v. Sharpe*, 9 *Johns. Rep.* 163. *Jackson v. Burgett*, 10 *Johns. Rep.* 457. *Jackson v. West*, 10 *Johns. Rep.* 466. *Johnson's Dig., Deed*, 8. *Farnsworth v. Childs*, 4 *Mass. Rep.* 637. See as to the registry acts, 4 *Kent's Comm., Lect.* 58, p. 168—194, 3d edit. 1 *Story's Comm. on Equity Jurisprudence*, 385, and note (2.) same page.

32. Are not all agreements, bonds, and securities, given as a price for future illicit intercourse (*præmium pudoris*), or for the violation of a public law, or for the omission of a public duty, deemed incapable of confirmation or enforcement?

They are, upon the maxim, *ex turpi contractu non oritur actio*. 1 *Fonbl. Eq.*, b. 1, ch. 4, § 4, and notes (s. and y.) *Walker v. Perkins*, 3 *Burr.* 1568. *Franco v. Bolton*, 3 *Ves.* 370. *Clarke v. Berrain*, 2 *Ath.* 323, 337. *Whaley v. Norton*, 1 *Vern. Rep.* 483. *Robinson v. Gee*, 1 *Ves. R.* 251, 255. *Gray v. Matthias*, 5 *Ves.* 286. *Osley v. Browne*, 1 *Ball & Beatt.* 360. *Battersley v. Smith*, 3 *Madd. R.* 110. *Thompson v. Thompson*, 7 *Ves.* 470. *St. John v. St. John*, 11 *Ves.* 535, 536. But see *Spear v. Hayward*, *Prec. Ch.* 114. 1 *Story's Comm. on Equity Jurisprudence*, 294, and note (2.) same page.

33. If a party should apply to a court of equity, and carry on an unfounded litigation, protracted under circumstances, and for a length of time, which should deprive his adversary of his right to proceed at law on account of the statute of limitations, having in the intermediate time run against it, would not courts of equity themselves supply and administer within their own jurisdiction a substitute for that original legal right, of which the party had been thus deprived?

They would, and by their decree give him the fullest benefit of it.—2 *Story's Commentaries on Equity Jurisprudence*, 739.

34. At what time will the bar of the statute of limitations begin to run in cases of fraud or mistake?

It will begin to run from the time of the discovery of such fraud or mistake and not before.—2 *Story's Comm. on Equity Jurisprudence*, 739.

35. Are not all contracts and conveyances, whereby benefits are secured by children to their parents, objects of jealousy? -

They are. The natural and just influence, which a parent has over a child, renders it peculiarly important for courts of justice to watch over and protect the interest of the latter. And if such contracts are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them; especially when the original purposes, for which they have been obtained, are perverted, or used as a mere cover.—*Young v. Peachy*, 2 *Atk.* 254. *Glissim v. Ogden*, *Ibid.*, 258. *Cocking v. Pratt*, 1 *Ves.* 400. *Hawes v. Wyatt*, 3 *Bro. Ch. Rep.* 156. 1 *Madd. Chancery Pract.* 244, 245. *Carpenter v. Heriot*, 1 *Eden's Rep.* 338. *Blackburn v. Edgley*, 1 *P. Will.* 607. *Blunden v. Barker*, 1 *P. Will.* 639. *Morris v. Borough*, 1 *Atk.* 402. *Tendril v. Smith*, 2 *Atk.* 85. *Herron v. Herron*, 2 *Atk. Rep.* 160. *Jenkins v. Pye*, 12 *Peters' Rep.* 241. 1 *Story's Comm. on Equity Jurisprudence*, p. 306, § 310.

Similar, also, is the law in relation to client and attorney. Indeed, the general principle is so well established, that Lord Eldon on one occasion said, "It is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be a bounty for the execution of an antecedent duty."—*Hatch v. Hatch*, 9 *Ves.* 296, 297. Mr. Maddock, in 1 *Madd. Chan. Prac.* 95, note (f), has suggested that what is said as to an attorney, in *Morse v. Royal*, 12 *Ves.* 371, and in *Wright v. Proud*, 13 *Ves.* 138, does not seem warranted by the authorities. I confess myself at a loss precisely to understand what Mr. Maddock intended by his remarks. Surely he could not mean to say, that a gift to an attorney, while the relation continued, could not be avoided, unless fraud or imposition were proved; for that would be contradicted by the doctrine maintained in several cases.—*Wallis v. Middleton*, 1 *Cox's R.* 125. *Hatch v. Hatch*, 9 *Ves.* 296, 297. *Gibson v. Jeyes*, 6 *Ves.* 276. *Wood v. Downes*, 18 *Ves.* 123. *Olaham v. Hand*, 2 *Ves.* 259. *Montesquieu v. Sandys*, 18 *Ves.* 313. See also *Bellew v. Russell*, 1 *Ball & Beatt. Rep.* 104, 107. *Harris v. Tremenehere*, 14 *Ves.* 34, 42. *Walmsley v. Booth*, 2 *Atk.* 29, 30. See also *Wendell v. Van Rensselaer*, 1 *Johns. Chancery Rep.* 350. *Hylton v. Hylton*, 2 *Ves.* 547, as cited by Lord Eldon, 18 *Ves.* 126. *Newland on Contracts*, ch. 31, p. 453. *Welles v. Middleton*, 1 *Cox's Rep.* 125, 18 *Ves.* 126. 1 *Story's Comm. on Equity Jurisprudence*, 309.

Similar considerations apply to the case of a medical adviser and his patient.—1 *Story's Equity Jurispru.*, p. 310. The relation of principal and agent is affected by the same considerations; and it is very certain, that agents are not permitted to become secret vendors or purchasers of property, which they are authorized to buy or sell for their principals, or by abusing their confidence, to acquire unreasonable gifts or advantages. Indeed, agents must deal in good faith towards their principals. See the following case in support of this rule. Cited notes, No. 2, and No. 3, in

Story's Equity Jurisprudence, p. 311. *Church v. Marine Insurance Co.*, 1 *Mason Rep.* 341. *Barker v. Marine Ins. Comp.*, 2 *Mason Rep.* 369. *Woodhouse v. Meredith*, 1 *Jac. & Walk.* 204, 222. *Massey v. Davies*, 2 *Ves. Jr.*, 318. *Crowe v. Ballard*, 3 *Bro. Ch. Rep.* 120. *Lees v. Nuttall*, 1 *Russ. & Mylne*, 53, *S. C.* 1 *Tamlyn, Rep.* 282. See *Crowe v. Ballard*, 3 *Bro. Ch. Rep.* 117. *Puecell v. McNamara*, 14 *Ves.* 91. *Huguevin v. Basley*, 14 *Ves.* 273. *Watt v. Grove*, 2 *Sch. & Left.* 492. *Fox v. McKreith*, 12 *Cro. Ch. Rep.* 400. *T. C. 2 Cox, Rep.* 220. *Coles v. Trecothick*, 9 *Ves.* 246. *Lowther v. Lowther*, 13 *Ves.* 102, 103. *Seley v. Rhodes*, 2 *Sim. & Stu. Rep.* 49. *Morret v. Paske*, 2 *Atk.* 53. *Green v. Winter*, 1 *Johns. Ch. Rep.* 27. *Parkest v. Alexander*, 1 *Johns. Ch. Rep.* 394. *The Case of Gray v. Mansfield*, 1 *Ves. Rep.* 379, has been very justly doubted by Mr. Belt, as not consistent with established principles.—See *Belt's Supplement*, 167.

36. May not a party injured by the fraudulent conduct of a banking corporation, maintain an action against the individual members?

Yes. If the stockholders of a bank, whilst their charter is in force and their bills in free circulation, suddenly withdraw and divide their capital stock; and the funds left in the bank are insufficient to pay their debts, they are liable to the persons injured for their fraudulent conduct.

Their doing the act as corporators under a charter can be no defence. But generally to support an action for a vote or other act as a member of a corporation, it must appear that he acted wilfully, maliciously, or fraudulently, with intent to injure the plaintiff.—*Vose v. Grant*, 15 *Mass.* 519.

37. Is not a discharge produced by fraud in respect to an execution, void?

It is.—*Lewis Adms. v. Gamage et al.*, 1 *Pick. Mass. Rep.* 346.

38. Must not a fraud, to be indictable, be such as affects the public; or is calculated to defraud numbers?

It must.—*The People v. Stone*, 9 *Wendell's N. Y. Rep.* 187.

Per Cur. A fraud, to be indictable at common law, must be such as affects the public, or is calculated to defraud numbers, and which ordinary care and caution cannot guard against; as if a man uses false weights and measures, and sells by them to his customers, in the general course of his dealing; or defrauds another under false tokens; or if there be a conspiracy to cheat; for common care and prudence are no protection against these. This was the rule laid down by Lord Mansfield in *Rex v. Wheatly*, 2 *Burr.* 1127, and has ever since been considered as establishing the true boundary line between frauds that are, and those that are not indictable at common law.—*Rex v. Young*, 3 *T. R.* 104. 6 *Mod. R.* 42. 1 *Salk.* 379. 6 *T. R.* 565. 1 *East*, 185. 2 *Strange*, 866. 2 *East, Crown Law*, 816. It was adopted and followed by this court in *The People v. Babcock*, 7 *Johns. Rep.* 201: and *The People v. Johnston*, 12 *Johns. R.* 292.

39. Where money or goods are obtained by fraud on a creditor, may not the lender or seller treat the loan or sale as a nullity?

He may, and bring his action immediately.—*Manufacturers' & Mechanics' Bank v. Gore et al.*, 15 *Mass. Rep.* 75. *Salem Bank v. Gloucester Bank*, 17 *Ibid.* 1, 33.

40. Where goods are obtained by false representations, may not the vendor claim them even in the hands of the sheriff?

He may, but not in the hands of a *bona fide* purchaser.—*Buffington v. Gerrish*, 15 *Mass. Rep.* 156. *Palmer v. Hand*, 13 *Johns. N.Y. Rep.* 454.

41. May not a man be received to aver against his own deed, in cases of fraud?

He may.—*Bliss v. Thompson*, 4 *Mass. Rep.* 488.

42. May not a private act obtained by fraud be avoided?

It may, if the jury so find.—*Commonwealth v. Breed*, 4 *Pick. Mass. Rep.* 460.

STATUTE OF FRAUDS.

1. What does the statute of frauds, of 29 Car. II., ch. 3, declare in prevention of actions, &c.?

It declares that no action should be brought to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that was not to be performed in one year, unless there was some memorandum or note in writing of the agreement, signed by the party to be charged, or his agent.

The statute, in respect to the memorandum, applied also to contracts for the sale of goods, wares, and merchandise, in cases where there was no delivery and acceptance of part, or payment in part, or something in earnest given.

This statute is assumed to be the basis of the statute laws of the several states on this subject.

The statute only applies to agreements which are, by express stipulation, *not* to be performed within a year. It does not apply to cases in which the performance of the agreement depends upon a contingency which may, or may not happen within the year.—*Fenton v. Emblers*, 3 *Burr. Rep.* 1278. *Wells v. Horton*, 12 *B. Moore*, 177. *Moore v. Fox*, 10 *Johns. Rep.* 244. *M'Lees v. Hale*, 10 *Wend. Rep.* 426. Nor does the statute apply to the case of goods sold and delivered within the year, but where the price was not to be paid until after the expiration of the year.—*Donellan v. Reed*, 3 *B. & Adolph.* 899. *Holbrook v. Armstrong*, 1 *Fairfield's Rep.* 31. 2 *Kent*, 510, note (a.) same page.

2. Has not this statute been frequently re-enacted in New York ?

It has, and the last revision of the statute law of the state has not changed its force or construction.—*New York Revised Statutes*, vol. 2 p. 113, § 1. *Ibid.*, vol. 2, p. 135, § 2. *Ibid.*, vol. 2, p. 136, § 3. *Ibid.*, vol. 2, p. 137, § 2. But the New York statute uses the word *subscribed*, instead of the word *signed*, in the statute of Charles II.

The Massachusetts revised statutes of 1835, follow closely the words of the English statute of frauds. But they contain a provision which puts an end to the question which has much agitated and divided the courts of law in England and in this country, (*Kent's Com.* vol. 3, p. 121, 122.) The consideration of the promise need not be expressed in the writing, but may be proved by parol.—2 *Kent*, p. 410, note (b.)

And it applies equally to the grant or assignment of any existing trust in goods and things in action, as well as to lands. The signing of the agreement by one party only, is sufficient, provided it be the party sought to be charged.

He is estopped by his signature from denying that the contract was validly executed, though the paper be not signed by the other party, who sues for a performance.—*Allen v. Bennett*, 3 *Taunt. Rep.* 169. *Lord Manners*, in 2 *Ball & Beatty*, 370. *Sir William Grant*, in 3 *Ves. & Beames*, 192. *Sir Thomas Plumber*, in 2 *Jac. & Walk.* 426. *Flight v. Bollond*, 4 *Russell's Rep.* 428. *Ballard v. Walker*, 3 *Johns. Cas.* 60. *Seton v. Slade*, 7 *Vesey*, 265. *Clason v. Bailey*, 14 *Johns. Rep.* 487. *Douglas v. Spears*, 2 *Nott & M'Cord*, 207. *Palmer v. Scott*, 1 *Russell & Mylne*, 391. 2 *Kent*, 510, 511.

3. May not the signature be with lead pencil, according to the practice in cases of hurried business ?

It may. The mark of one unable to write, or even a printed name, under certain circumstances, is a sufficient signature, and if the name be inserted in such a manner as to have the effect of authenticating the instrument, it is immaterial in what part of it the name be found.—*Stokes v. Moore*, 1 *Cox's R.* 519. *Shelby v. Shelby*, 3 *Merrivale's R.* 2. *Ogelvie v. Foljambe*, 3 *ibid.* 53. *Knight v. Cuckford*, 1 *Esp. N. P. C.* 190. *Saunderson v. Jackson*, 2 *Boss & Pull.* 238. *Schneider v. Morris*, 2 *M. & Schw.* 286. *Classon v. Bailey*, 14 *Johns. R.* 484. *Thornton v. Kempster*, 2 *Taunt. Rep.* 786. *Penniman v. Hartshorn*, 13 *Mass. Rep.* 87. 2 *Kent*, p. 511.

The contract must, however, be stated with reasonable certainty, so that it can be understood from the writing itself, without having recourse to parol proof.—*Baily & Bogart v. Ogdens*, 3 *Johns. R.* 399. *Champion v. Plummer*, 4 *Boss & Pull.* 252. *Elmore v. Kingscote*, 5 *Barnw. & Cress.* 583. If a bill of parcels be delivered to, and accepted by the purchaser, with his name in it, from the commission merchant, it is a sufficient memorandum of the sale of the goods, within the statute of frauds.—*Batters v. Sellers*, 5 *Har. & Johns.* 117. 2 *Kent*, 511.

4. Is the writing in compliance with the statute, unless the essential

terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else?

It is not; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent.—*Parkhurst v. Van Courtlandt*, 1 *Johns. Ch. R.* 280, 281. *Abeel v. Radcliff*, 13 *Johns. Rep.* 297.

5. Where there is judgment against the vendor, and the purchaser has notice of it, will not the fact affect the validity of the sale of personal property?

The fact of itself will not. But if the purchaser, knowing of the judgment, purchases with the view and purpose to defeat the creditor's execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor.—2 *Kent*, 513.

6. On what does the question of fraud depend?

It depends on the motive. The purchaser must be *bona fide*, as well as upon a valuable consideration. This rule has been repeatedly declared and established.—*Lord Mansfield*, 1 *Burr Rep.* 474. *Cowp. Rep.* 434. *Dallas, Ch. J.*, 8 *Taunt. Rep.* 678. *Beales v. Guernsey*, 8 *Johns. Rep.* 446. *Duncan, J.*, 7 *Serg. & Rawle*, 2 *Kent*, 514. *Note [A] same page.*

7. Has not the statute of 13 *Elizabeth, ch. 5*, as to creditors, been universally adopted in America, as the basis of our Jurisprudence, on the same subject?

It has. The object of the legislature evidently was to protect creditors from those frauds which are frequently practised by debtors, under the pretence of discharging a moral obligation, that is, under the pretence of making suitable provisions for wives, children, and other relations. Independently of the statute, no one can reasonably doubt, that a gift or conveyance, which has neither a good nor a meritorious consideration to support it, ought not to be valid against creditors; for every man is bound to be just before he is generous.—*Copis v. Middleton*, 2 *Mad. Rep.* 482. *Patridge v. Gopp*, 1 *Eden. Rep.* 166, 167, 168, *S. C.* *Ambler R.* 598, 599. 1 *Story's Equity Jurisprudence*, p. 345, *Note [1] same p.* And the very fact, that he makes a voluntary gift or conveyance to mere strangers, to the prejudice of his creditors, affords a conclusive ground that it is fraudulent. The statute, while it seems to protect the legal rights of creditors against the frauds of their debtors, anxiously excepts from such imputation the *bona fide* discharge of moral duties. It does not, therefore, declare all voluntary conveyances to be void; but only fraudulent conveyances to be void.—1 *Fonblf. Eq. B.* 1, *ch. 4*, 812. *Note (A), Doe v. Routledge, Cowp. Rep.* 708. *Cadogan v. Kennett, Cowp. Rep.* 432, 434. *Holloway v. Millard*, 1 *Madd. Rep.* 227. *Sagitary v. Hide*, 2 *Vern.* 44. And whether a conveyance be fraudulent or not, is declared to depend

upon its being made "upon good consideration and *bona fide*." The word "Voluntary," is not to be found either in the statute of 13 *Elizabeth*, ch. 5, or in the stat. of 27 *Elizabeth*, ch. 4, *Holloway v. Millard*, 1 *Madd. Rep.* 227, 228. A voluntary conveyance to a stranger, made *bona fide* by a party not indebted at the time, would be good against subsequent creditors.—*Holloway v. Millard*, *Ibid*, 227, 228. *Walker v. Boroughs*, 1 *Atk.* 93. 1 *Story's Comm. on Equity Jurisprudence*, p. 345, and note (2) same page.

8. Is an agreement merely to re-sell goods binding ?

It is not, without something to bind the bargain, or some note or memorandum in writing, concerning the contract.—*Chapman et al. v. Searle's Adm.*, 3 *Pick. Mass. Rep.* 38. *Parks v. Hall*, 2 *Ibid*, 206.

9. Does a mere contract to sell without delivery, change the property ?

It does not.—*Pennyman v. Hartshorn et al.*, 13 *Mass. Rep.* 87.

10. Are not sales by sheriff within the statute of frauds ?

They are.—*Kent, C. J.*, in *Jackson v. Catlin*, 2 *Johns. Rep.* 248, observed, sales by sheriff are within the statute of frauds, but any memorandum in writing, whether endorsed on the execution, or connected by a schedule, would be a sufficient compliance with the act, according to the case.—*Simonds v. Catlin*. The note in writing must specify with sufficient certainty, the lands sold, and the purchaser, or it will not be sufficient.—*Simonds v. Catlin*, 2 *Caines' N. Y. Rep.* 61.

FRAUD—STATUTE OF,

When allowed, or not, as a bar in equity, 54, 55, 57, 59,
60, 62, 63, 80, 80, 91, 740.

Not in cases of part performance, - 62, 76, 740.

Not in cases of fraud, - 76, 77, 80, 740.

Story's Comm. on Equity Jurisprudence.

FRAUD—Judgment may be impeached for - 499, 508.

Statute of, contracts under, their validity abroad, 219, 369,
524.—*Story's Conflict of Laws.*

FRAUD AFFECTING MARRIAGE CONTRACTS.

1. May not contracts and agreements respecting marriage, (commonly called marriage brokerage contracts,) by which a party engages to give another a compensation, if he will negotiate an advantageous marriage for him, be properly placed under the head of constructive frauds ?

They may. The civil law does not seem to have held contracts of this sort in such severe rebuke ; for it allowed *proxenetae*, or matchmakers,

to receive a reward for their services to a limited extent.—*Cod. Lib.* 5, tit. 1, l. 6. 1 *Story's Com. on Eq. Jur.* p. 263.

And the period is comparatively modern in which a different doctrine was engrafted into the common law, and received the high sanction of the House of Lords.—*Hall & Kean v. Potter*, 3 *P. Will.* 76. 1 *Eq. Cas. Abridg.* 89. 3 *Lev.* 411. *Show. Parl. Cas.* 76. 1 *Fonbl. Eq. b. 1, ch. 4, § 10.* *Grisley v. Lother*, *Hob. R.* 10. *Law v. Law*, *Cas. Temp. Talb.* 140, 142. *Vauxhall Bridge Company v. Spencer*, *Jac. R.* 67. In *Boynton v. Hubbard*, 7 *Mass. R.* 112, *Mr. Chief Justice Parsons* said, "we do not recollect a contract which is relieved against in chancery, as originally against public policy, which has been sanctioned in courts of law, as legally obligatory on the parties.

"For although it has been said in chancery, that marriage brokerage bonds are good at law, but void in equity; yet no case has been found at law, in which those bonds have been holden good." But see *Grisley v. Lother*, *Hob. R.* 10, and a case cited in *Hall v. Potter*, 3 *Leving. R.* 411, 412. 1 *Fonbl. Eq. b. 1, ch. 4, § 10, note (R.)* 1 *Story's Com. on Equity Jur.* p. 263.

The ground upon which courts of equity interfere in cases of this sort, is not upon any notice of damage to the individuals concerned, but from considerations of public policy.—1 *Fonbl. Eq. b. 1, ch. 4, § 10, note (R.)*. *Newland on Contracts*, ch. 34, p. 469—472. "Marriage brokerage bonds, which are not fraudulent on either party, are yet void, because they are a fraud on third persons, and a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends, and they are relieved against as a general mischief for the sake of the public."—*Per Parsons, Ch. J., in Boynton v. Hubbard*, 7 *Mass. Rep.* 118. *Story's Commentary on Equity Jurisprudence*, p. 263.

2. Are not all such marriage contracts utterly void?

They are.—*Arundell v. Trevillian*, 1 *Rep. Ch.* 47 (87). *Drury v. Hooke*, 1 *Vern. R.* 412. *Hall v. Potter*, 3 *Lev.* 411, *S. C. Shower, Parl. Cas.* 76. *Cole v. Gibson*, 1 *Ves.* 507. *Debonham v. Ox*, 1 *Ves.* 276. *Smith v. Aykerill*, 3 *Atk.* 566. *Hylton v. Hylton*, 2 *Ves.* 548. *Stribblehill v. Brett*, 2 *Vern.* 446, *S. C.* *Price, Ch.* 165. 1 *Bro. Parl. Cas.* 57. *Roberts v. Roberts*, 3 *P. Will.* 74, n. (1). *Id.* 75, 76. *Law v. Law*, 3 *P. Will.* 391, 394. *Williamson v. Gihon*, 2 *Sch. & Lef.* 357. 1 *Eq. Cas. Abridg.*, 98, F. 1 *Story's Commentaries on Equity Jurisprudence*, p. 265.

3. Can money paid under such a contract be recovered back again in a court of equity?

The answer to this question may be found on page 265, 1 *Story's Com. on Equity Jurisprudence*.

4. How would a bond be held, given to the obligee voluntarily after the marriage, and without any previous agreement for the purposes. as a re-

muneration for having assisted the obligor in an elopement and marriage without the consent of friends?

5. How would secret contracts be held, made with parents or guardians or other persons, standing in a peculiar relation to the party, whereby upon a treaty of marriage they are to receive a compensation or security, or benefit in promoting the marriage, or giving their consent to it?

6. Suppose a woman makes a settlement secretly in contemplation of marriage, of her own property to her own separate use, without her intended husband's privity, how will such settlement be held? And again, suppose a woman makes a separate conveyance under like circumstances, in favor of a person for whom she is under no moral obligation to provide, how would such conveyance be treated?

7. How are contracts in restraint of marriage held, valid or void?

8. Is, or is not, a reciprocal engagement between a man and a woman to marry each other, good?

9. How would a contract be held which restrains a person from marrying at all, or from marrying any body except a particular person?

10. What says the doctrine of the civil law, does it or does it not say, that marriage ought to be free?

11. How would a contract of marriage be held, where the marriage is deferred to some future period?

12. How was a gift to a woman, of land, if she should not marry, held by the civil law?

13. How was a gift to a father, if his daughter who was under his authority, (*sub potestate patrum*,) should not marry, treated by the civil law?

14. Was or was not, a distinction taken in the civil law between such general restraints of marriage, and a special restraint, as to marrying or not marrying a particular person?

15. How is a condition annexed to a gift or legacy, that the party should not marry without the consent of parents, or trustees, or other persons specified, held? does or does not the civil law agree with the English in answer to this question?

16. Is a condition that a widow shall not marry, lawful or unlawful?

17. Is a condition prescribing due ceremonies, and a due place of marriage, good, or not good?

18. Are courts of equity generally inclined to lend an indulgent consideration to conditions in restraint of marriage, or are they not?

19. If the condition in restraint of marriage be subsequent in general, in its character, how is it treated?

20. If it be only a limited restraint (such as to a marriage with the consent of parents or not until the age of twenty-one), and there is no bequest over upon default, how is this condition treated?

[The compiler has omitted the answers to the foregoing sixteen questions, for this reason, that he thinks the whole subject to which they relate is more fully and clearly discussed in *Mr. Justice Story's Commentaries on Equity Jurisprudence*, than in any other work now in the hands of American students, and that the arrangement of Mr. Story cannot be changed nor the matter reduced within the limits of his plan without materially affecting the force and perspicuity of the subject as arranged in those commentaries, to which the reader is referred, *Vol. I. pp. 261, 289.*]

GRANT OR GIFT

1. What is a grant?

A grant in the common law, is the conveyance in writing of incorporeal things, not lying in livery, and which cannot pass by words only; as of reversions, advowsons in gross, tithes, rents, services, common in gross, &c. It has also been taken generally, for every gift and grant of any thing whatsoever.—*Co. Lit.* 172. 3 *Rep.* 63.

2. What is the distinction between gift of personal property and a grant?

Gifts are always gratuitous. Grants are upon some consideration or equivalent.—2 *Comm.* 440.

3. What may be included under the head of gifts or grants of chattels real, and what consideration in the eye of the law, converts the gift, if executed, into a grant—if not executed, into a contract?

Under the head of gifts or grant of chattels real, may be included all leases for years of land, assignments, and surrenders of those leases, and all other methods of conveying an estate less than freehold.

In the eye of the law almost any consideration is sufficient.—*Ibid.*, 440.

4. May a gift or grant of personal property be made by parol?

It may.—3 *M. & S.* 7. But when an assignment is for a valuable consideration, it is usually in writing; and when confined merely to personalty, is termed a bill of sale. An assignment, or covenant, does not pass, after acquired personal property.—5 *Taunt.* 212; but where there

has been a subsequent change of new for old articles, and the assignment is afterwards set aside, it will in general be left to a jury to say whether the new were not substituted for the old.

5. Must there be an immediate change of possession?

In general, there should be an immediate change of possession, or the assignment made notorious; or creditors, who were ignorant of the transfer, may treat it as fraudulent and void, on the ground that the grantor was by his continuance of possession enabled to gain a false credit.—*Twyne's Case*, 3 Co. 91. See *Cases*, Tidd. *Prac.* 8th ed., 1043, 4. 1 *Camp.* 333, 4. 5 *Taunt.* 212. As to the notoriety of the sale, 2 *B. & P.* 59. 8 *Taunt.* 838. 1 *B. Moore*, 189.

If possession be taken at any time before an adverse execution, though long after the date of the deed, it will be valid.—15 *East.* 21.

6. Is an assignment to a creditor of all a party's effects, in trust for himself and other creditors, valid?

It is.—3 *M. & S.* 517.

7. And as a debtor may prefer one creditor to another, may he, on the eve of an execution by one creditor, assign his property to another, so as to satisfy the latter?

He may, and leave the other unpaid.—5 *T. R.* 235. But an assignment made by way of sale, to a person not a creditor, in order to defeat an execution, will, if the purchaser know that intention, be void, although he paid a full price for the goods.—1 *East.* 51. 1 *Barr.* 474.

In New-York, such deeds are void as to creditors.—2 *R. S.* 135, § 1. See accordingly 2 *R. S.* 137, § 1, &c.

8. Is a grant void if it be totally uncertain, as of all the lands and tenements of the grantor, situate in such a county or state?

It is.—13 *Johns. Rep.* 97.

9. How shall every grant be construed?

Most strongly against the grantor, and favorably for the grantee.—*Plow.* 10.

10. Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, will the addition of an allegation, mistaken or false, respecting it, frustrate the grant?

It will not; but when the grant is in general terms, then the addition of a particular circumstance will operate by way of restriction and modification of such a grant.—5 *East.* 51.

In the construction of grants both course and distance must give way to natural or artificial monuments or objects, and courses must be varied,

and distances lengthened and shortened, so as to conform to the natural or ascertained objects or grounds called for by the grant.—8 *Wend.* 183.

It has been recently determined, that by the law of England, in order to transfer property by gift, there must be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.—2 *Bar. & Ald.* 551.

GUARANTY.

1. What is a guaranty in its enlarged sense ?

It is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person, who in the first instance is liable.

As this engagement is a common one in mercantile transactions, and analogous, in many respects, to that of endorser of negotiable paper, a few remarks concerning its creation and validity will not be altogether inapplicable to the subject.—3 *Kent*, 121.

A guarantee is generally understood, in a legal sense, to mean a promise or an engagement to be answerable for the debt or default of a third person.—*Comyn on Contracts*, 189.

2. Have not the English statutes of frauds been adopted generally throughout the United States ?

They have, and require that “upon any special promise to answer for the debt, default, or miscarriage of another person, the agreement, or some memorandum or note thereof, must be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”—3 *Kent*, 121. *Turner v. Hubbell*, 2 *Day*, 457. *Peabody v. Harvey*, 4 *Conn. Rep.* 119. *Floyd v. Harrison*, 4 *Bibb*, 76. *Tuleston v. Nettleton*, 6 *Pick.* 509. *Sears v. Brink*, 3 *J. R.* 211. *Leland Creyon*, 1 *M'Cord*, 100. *Boyce v. Owens*, 2 *M'Cord*, 208. *Simpson v. Patten*, 4 *J. R.* 422. *Jackson v. Raynor*, 12 *J. R.* 291. *Waggoner v. Gray*, 2 *Hen. & Munf.* 603. *Aldrich v. Turner*, 1 *Gill & Johns. Md. R.* 427. *Elliot v. Geize*, 7 *Har. & Johns. Md. Rep.* 457. *Leonard v. Vredenburgh*, 8 *Johns. N Y. Rep.* 29.

3. Is not an agreement to become a guarantor, or surety for another, engagement within the statute ?

It is, and if it be a guaranty for the subsisting debt or engagement of another person, not only the engagement, but the consideration, must appear in writing.—3 *Kent*, 121.

4. What does the word *agreement*, in the statute, include ?

It includes the consideration for the promise, as well as the promise itself ; for without a consideration there is no valid agreement.—*Ibid*, 122.

This was the decision in the case of *Wain v. Walters* ; and though

that decision has been frequently questioned, it has since received the decided approbation of the courts of law ; and the C. J. of the K. B. observed, that he should have so decided, if he had never heard of the case of *Waine v. Walters*.—5 *East's Rep.* 19. *Ex parte Minet*, 14 *Ves. Rep.* 190. *Ex parte Gardom*, 15 *ibid.*, 286. *Saund. v. Wakefield*, 4 *Barn. & Ald.* 595. *Jenkins v. Reynolds*, 3 *Brod. & Bing.* 14. *Morely v. Boothby*, 2 *Bing. Rep.* 107. *Newbury v. Armstrong*, 6. *Bing.* 201.

5. Has not the English construction of the statute of frauds been adopted in New York and South Carolina ?

It has, and rejected in several other states.—*Sears v. Brink*, 3 *Johns. Rep.* 210. *Leonard v. Vredenburg*, 8 *ibid.*, 29. 2 *Nott & M'Cord*, 372, note. *Packard v. Richardson*, 17 *Mass. Rep.* 122. *Levy v. Merrill*, 4 *Greenleaf's Rep.* 180. *Ibid.*, 387. *Sage v. Wilcox*, 6 *Conn. Rep.* 81. *Miller v. Irvine*, 1 *Dev. N. C. Rep.* 103. The point was extensively discussed in this last case, and the majority of the court, under the act of 1819, which followed the English statute of frauds, held, that it was not requisite, under the statute, that the consideration of the contract should be set forth in the written memorandum of it, and that the consideration might be shown by parol proof.—3 *Kent*, 122.

6. Can the contract of guaranty be varied ?

It cannot.—*Grant v. Naylor* 4 *Cranch's U. S. Rep.* 224.

If, upon a letter of guaranty, addressed to a particular person, advances are made upon the faith of the guaranty, it is the duty of the person so making the advances, to give notice within a reasonable time to the guarantor, of the amount of the advances, and that reliance was placed upon the guaranty to ensure the payment, otherwise the guarantor is discharged from all responsibility.—*Cremer v. Higgin et al.*, 1 *Mason*, 323.

Where money is advanced to a partnership, under a guaranty, and the partnership is dissolved, and the debt then carried, at the request of the debtors, to their separate accounts, according to their proportion of interest in the partnership ; and the creditor gives the partners, separately, a credit for such proportion, and discharges the partnership account, by carrying it to such separate account, and notice is given thereof to the guarantor, the latter is discharged from all responsibility.—*Ibid.*

If a creditor will undertake to give a new credit to the debtor, and thereby, materially to change the situation of a surety, and *à fortiori*, of a guarantor, the latter is absolved from all responsibility, unless he has notice of, and becomes a party to the new transaction.—*Ibid.*

A guaranty of the notes of A, cannot be applied as a guaranty of the notes of A and B.—*Russell v. Perkins*, 1 *Mason*, 368.

Upon the guaranty to the plaintiff of all notes of A, which he should endorse, to the amount of ten thousand dollars, the plaintiff endorsed notes of A to the stipulated amount, at several banks, and when the notes became due, they were taken up at the banks, and the new notes, signed by A and B, his partner, and endorsed, were received by the banks in their

stead. It was held that the guaranty did not apply to the new notes, and that by such substitution the old notes were extinguished.—*Ibid.*

7. Where the guaranty is direct and absolute, is any demand and notice of non-payment necessary?

It is not.—*Taylor and Williams v. Ross*, 3 Yerger's Tenn. Rep. 330. *Allen v. Rightmere*, 20 Johns. N. Y. Rep. 366.

Nor is notice necessary, where the debt has become absolute, before the guaranty is given.—*Breed v. Hillhouse*, 7 Conn. Rep. 523. *Norton v. Eastman*, 4 Greenl. 221. *Boyd v. Cleaveland*, 4 Pick. 525. *Comyn v. Gibbs*, 9 S. R. 402. *Sage v. Wilcox*, 6 Conn. Rep. 81. *Oxford Bank v. Haynes*, 8 Pick. Mass. Rep. 423. *Williams v. Granger*, 4 Day's Conn. Rep. 444.

8. Does not the very act of guaranty presuppose a knowledge of the nature of the debt?

It does.—*Norton et al. v. Eastman*, 4 Greenleaf Me. Rep. 521.

9. Is a surety bound beyond the extent of his engagement?

He is not, and therefore an old security will not be applicable to a new transaction, particularly when it is restrained to a particular time.—*Liverpool Water-works v. Atkinson*, 6 East, 507. *St. Saviour's, Southwark, v. Bostock*, 2 N. R. 175. *Bartlett v. Attorney-General, Parker*, 277.

The extent of the condition of an indemnity-bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate.—*Pearsall v. Summerville*, 4 Taunt. 593.

10. Will a neglect of the principal to prosecute the debtor, discharge the security?

It will not.—*Townsend v. Riddle*, 2 N. Hamp. Rep. 448. *U. S. v. Hunt*, 1 Gallison's U. S. Rep. 32. *Barnard v. Norton, Kirby's Conn. Rep.* 193. *King v. Baldwin*, 17 Johns. N. Y. Rep. 384.

The doctrine that a mere delay to sue the principal does not discharge a surety, is recognized in the following cases.—*Thursday v. Gray*, 4 Yeates, 518. *Cope v. Smith*, 8 Serg. & Rawle's Rep. 110. *Commonwealth v. Wolbert*, 6 Binn. 292. *Fulton v. Matthews*, 15 Johns. Rep. 433. *Powell v. Waters*, 17 Johns. Rep. 176. *People v. Russell*, 4 Wend. 570. *Townsend v. Riddle*, 2 New Hamp. Rep. 448. *Lenox v. Prout*, 3 Wheat. 524. *McKenny v. Waller*, 1 Leigh, 434. *Wayne v. Kirby*, 2 Bailey, 551. *Treasurers v. Johnst.*, 4 M'Cord, 458. *Shubrick v. Russell*, 1 Des. 315. *Bra. v. Hawk*, 1 Blac. 392. *Stafford Bank v. Crosby*, 8 Greenlf. 190. *Hoge v. Penn*, 1 Bland, 30. *Kennebeck Bank v. Tuck.*, 5 Greenlf. 130. *Gahn v. Neimcewicz*, 11 Wend. 317, 318. *Reynolds v. Ward*, 5 Wend. 501. *Clag v. Salmon*, 5 Gill. & Johns. Rep. 314. *Stout v. Ashton*, 5 Monroe, 252. *Norris v. Crum.*, 2 Rand. 323. *Freeman Bank v. Rolins*, 13 Me. 202. *Oxford Bank v. Lewis*, 8 Pick. 458. *Blackstone Bank v. Hill*, 10 Pick. 129. *Fullam v. Valentine*, 11 Pick. 156. *U. S.*

v. Kirkpatrick, 9 *Wheat*. 737. *Dox v. Postmaster General*, 1 *Peters' S. C. Rep.* 326.

And it is clear that mere *gratuitous forbearance* without any binding agreement or obligation to refrain from taking proceedings, cannot exonerate the surety in law or in equity.—*Alcock v. Hill*, 4 *Leigh*, 622. *Johnson v. Thompson*, 4 *Watts*, 446. *Hall v. Constant*, 2 *Hall*, 185. *U. S. v. Simpson*, 3 *Penn. Rep.* 439. *Reynolds v. Ward*, 5 *Wend.* 801.

As to the effect of a request by the surety to proceed against the principal, followed by delay on the part of the creditor, and the insolvency of the principal, see *Crane v. Newhall*, 2 *Pick.*, 2 *edit.* 614, n. 1, and cases there cited. *Andrews v. Bealls*, 9 *Cowen*, 693. *Frye v. Barker*, 4 *Pick.* 382. *Bellows v. Lovell*, 5 *Pick.* 307. *Moore v. Broussard*, 20 *Martin's Louis. Rep.* 277. *Davis v. Huggins*, 3 *New Hamp. Rep.* 231. *Manning v. Shatwell*, 2 *South.* 585. *Treasurers v. Johnston*, 4 *McCord*, 458. *Warner v. Beardsley*, 8 *Wend.* 194. *De Kuff v. Turbett*, 3 *Yeates*, 157. *Erie Bank v. Gibson*, 1 *Watts*, 143. *Paine v. Packard*, 13 *Johns. Rep.* 174. *Ring v. Baldwin*, 17 *Johns. Rep.* 403. *Manchester v. Sweeting*, 10 *Wend.* 162. *Hancock v. Bryant*, 2 *Yerger's Rep.* 476. *Valentine v. Farrington*, 2 *Gow.* 53. *Snell v. Reynolds*, 3 *Mis.* 95.

But if the creditor, without the consent of the surety, agree and become bound to give time to the principal debtor, the surety is clearly, as a general rule, declared from responsibility, in law and in equity.—*Ludlow v. Simond*, 2 *Caines' Cases in Error*, 1. *Hill v. Bull, Glimmier*, 146. *Jones v. Bullock*, 2 *Bibb.* 467. *Baird v. Rice*, 1 *Call*, 18. *Commonwealth v. Vanderslice*, 8 *Serg. & Rawle*, 452. *Bank v. Woodward*, 5 *N. Hamp.* 99. *Bank of Steubenville v. Hone*, 6 *Ham.* 17. *Sailly v. Gilmore*, 2 *Paige*, 497. *Ellis v. Bibb*, 2 *Stew.* 63. *Farmers' & Mechanics' Bank v. Cooley*, 4 *J. J. Marsh*, 366. *Robinson v. Offatt*, 7 *Monroe*, 541. *Norton v. Roberts*, 4 *Monroe*, 492. *Galphin v. McKenney*, 1 *McCord Ch.* 297. *Hampton v. Levy*, 1 *McCord Ch.* 112. *King v. Baldwin*, 2 *Johns. Chan.* 357. *Neimcewietz v. Ghan*, 3 *Paige*, 614. *Sneed v. White*, 3 *J. J. Marsh*, 526. *Clagget v. Salmon*, 5 *Gill. & Johns.* 314. *Gahn v. Neimcewietz*, 11 *Wend.* 312. *State v. Hammond*, 6 *Gill. & Johns.* 157. *Clippinger v. Crepps*, 12 *Watts*, 45.

11. Has the English rule, which requires that in an agreement to answer for the debt, default, or miscarriage of another person, the consideration as well as the promise itself must be in writing, been universally adopted in the United States?

It has not. But in the following cases, the correctness of the rule was admitted.—*Sears v. Brink*, 3 *J. R.* 211. *Stephens, Ramsey & Co. v. Winn*, 2 *Nott & McCord*, 372, note (a). And see *Appendix*, 3 *McCord*, 590. *Livingston v. Tremper*, 4 *J. R.* 416. *Violett v. Patton*, 5 *Cranch's Rep.* 142.

And in pursuance of the same rule of construction, it has been adjudged that if a guaranty be made simultaneously with the original contract, the consideration expressed in the latter will sustain the former.—*Leonard v. Vredenburg*, 8 *J. R.* 23, 2d *edit.* *Bailey & Bogart v. Freeman*, 11 *J.*

R. 221. See *Hunt v. Adams*, 5 Mass. Rep. 358. *Carver v. Warren*, Id. 545. *Lent v. Paddleford*, 10 Mass. Rep. 230. *Adams v. Bean*, 12 Mass. Rep. 137. *Duval v. Trask*, Id. 154.

12. Is not a guaranty of a note like any other promises without consideration, void?

It is.—*Tenney v. Prince*, 4 Pick. 385. S. C. 7 Pick. 243. *Flagg v. Upham*, 10 Pick. 148. *Nelson v. Sanborne*, 2 New Hamp. 414, 415. Unless the understanding is contemporaneous with the original debt.—*Leonard v. Vredenburg*, 8 Johns. 29. *Tenney v. Prince*, 4 Pick. 386, 387. *Per Parker, Ch. J.* *D. Wolf v. Rabaud*, 1 Peters' S. C. 476. *Bailey v. Freeman*, 11 Johns. 221. *Hunt v. Adams*, 5 Mass. 358. *Wheelwright v. Moore*, 2 Hall, 143. S. C. 1 Hall, 648. 1 Hall, 201.

13. Has there not been some discussion on the question, whether the consideration for an agreement, in writing, to pay the debt of another, be sufficiently set forth?

There has; and on this subject, it has been determined, that the words "for value received," are sufficient to answer the requirements of the statute.—*Aiken v. Duren*, 2 Nott & McCord, 370. *Caldwell v. M' Cay*, Id. 555. So the phrase "if the execution be delayed," was held to be a sufficient expression of the consideration. But the most important decisions on this subject, are those by which the authority of *Waine v. Warlters*, 5 East, 10, has been overruled.

14. Has it not been in several instances expressly decided, that a promise to pay the debt of another, in writing, and signed by the party promising, is a sufficient compliance with the statute of frauds, without any recital in the writing, of the consideration upon which the promise is founded?

It has.—*Packard v. Richardson*, 17 Mass. Rep. 122. *Sage v. Wilcox*, 6 Conn. Rep. 81. *Beckley v. Beardsley*, 2 South. 270. *Day's Note to Waine v. Warlters*, 5 East, 20. *Swift, Dig.* 537. *Appendix*, 3 McCord, 569, 589, 590.

15. If the party for whom the promise is made, be under no liability on account of the particular debt, default or miscarriage, for which the guaranty is given, and the whole responsibility is assumed by the promisor, is not the undertaking original?

It is, and not within the statute. Upon the preceding general principle, the following cases were decided.—*Perley v. Spring*, 12 Mass. Rep. 297. *Duval v. Trask*, Id. 154. *Townsley v. Sumrall*, 2 Peters, 182. *Farley v. Cleaveland*, 4 Cowen, 432. *Skelton v. Brewster*, 8 J. R. 293, 2d edit. *Stocking v. Sage*, 1 Conn. Rep. 519. *Gold v. Phillips*, 10 J. R. 412. *Myers v. Morse*, 15 J. R. 425. *Chase v. Day*, 17 J. R. 114. *Singerland v. Morse*, 7 J. R. 463. *Mease v. Wagner*, 1 McCord, 395. *Madden v. McCray*, 1 Id. 486.

16. May not the power given to an agent to sign a guaranty, be established by general proof of his having signed former guaranties which his principal has paid?

It may.—*Ulen v. Kitredge*, 7 Mass. Rep. 233.

17. Must not a promise to endorse the note of a third person, by which he obtains credit, to be binding, be in writing?

It must.—*Gallagher v. Brunell*, 6 Cowen, 346.

A letter of credit addressed by mistake to John and Joseph Naylor, and delivered to John and Jeremiah Naylor, will not support an action by John and Jeremiah for goods furnished by them to the bearer, upon the faith of the letter of credit. It is not a written contract between the plaintiffs and the defendant; and parol proof cannot be admitted to make it such. It is not a case of ambiguity, or of fraud, or of mistake on the part of the plaintiffs.—*Grant v. Naylor*, 2 Cond. Rep. 95.

To charge one person with the debt of another, the understanding must be clear and explicit.—*Russell v. Clarke's Exrs. Ibid.*, 417.

18. What is the duty of him who gives credit to another upon the responsibility of the undertaking of a third person?

Immediately to give notice to the latter of the extent of his engagement.—*Ib.*

19. Will a misrepresentation of the solidity of a mercantile house, made under a mistake of the fact, without any interest or fraudulent intention, sustain an action?

It will not; although the plaintiff may have suffered damages by reason of such misrepresentation.—*Ib.*

20. Must the construction of a letter of credit, or of guaranty, be the same in a court of equity, as in a court of law?

It must; and any facts which might be introduced into one court to explain the transaction, may be introduced into the other.—*Ib.*

GUARDIAN.

1. Who is a guardian?

In the general acceptance of the word, one who has the charge or custody of infants and their estates.

The guardian with us (says Sir William Blackstone), performs the office both of the tutor and curator of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune, or according to the language of the court of chancery, the tutor was the committee of the person, the curator the committee of the estate. But this office was frequently united in the

civil law : as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.—*Black. Comm.*, Book 1, p. 460.

2. Is the trading contract of an infant merely voidable, or absolutely void ?

It is absolutely void ; although, indeed, the trade in which he is engaged may be the means by which he gains his livelihood.—*Per Bailey, J., B. & C.* 826. Therefore an infant is not liable for goods supplied to him to trade with.—*Cro. Jac.* 494.

An infant is not liable for instruction in trade or business.—1 *T. R.* 40.

3. Is an infant liable at law for money lent, if laid out in the purchase of necessities ?

He is not.—2 *Esp.* 472. 1 *Salk.* 279. 14 *East*, 230.

In equity, however, relief may be obtained on such case, by the lenders being allowed to stand in the place of the creditor for necessities.—1 *P. Wms.* 482, 558. 1 *Ves.* 249.

4. Is an action on the case maintainable against an infant for the false warranty of a horse, if he knew it was unsound when the sale took place ?

He is not.—2 *Marsh.* 485. 4 *Camp.* 118. Nor will an action lie against him for falsely representing a horse to be his property, when it was not so.—1 *Hob.* 1778. 1 *Leon.* 169. Nor is an infant liable on the custom of the realm, for the loss of goods committed to his care, as an innkeeper.—*Roll. Ab. action sur le Case, D.* 3.

5. Is an infant liable to an action at law for representing himself to be of age, and by that pretence obtaining money ?

He is not.—*Bac. Ab. Infancy*, 1 *Leon.* 169. 1 *Sid.* 258, *sed vid. Peake's Rep.* 223. But in equity, it seems, infancy will not protect a party against the consequences of an assent which bears any dishonest appearances ; as where a man, who has a title, stands by and encourages and does not forbid a purchase inconsistent with such title, he shall be bound and all claiming under him.—9 *Mod.* 38. 2 *Eq. Ca. Ab.* 489. 1 *Bro. R.* 353. And it also seems an infant, if an infant above the age of discretion (*viz.* 14), be guilty of any fraud in affirming himself to be of full age, or if by combination with his guardian, he makes any contract or agreement, with intent afterwards to elude it by privilege of infancy, a court of equity will decree it good against him, according to the circumstances of the fraud.—*Bac. Ab. Infancy*. 2 *Vern.* 224. 2 *Ves.* 212. 3 *Burr.* 1802. But it seems equity can only thus exert itself where the act done by the infant is voidable ; if it be absolutely void it cannot make it good, though there appear circumstances of fraud on the part of the infant.—1 *H. Bla.* 75. See *Bing. on In.* 96, 97.

6. If a person, after obtaining his full age and before any action brought, expressly and voluntarily promise to pay a demand upon him, though not for necessities, will he be thereby rendered liable ?

He will.—1 *Str.* 690. 1 *T. R.* 648. 2 *B. & C.* 824. 4 *D. & R.* 545, *S. C.* Therefore an express promise, made after the infant's attaining his full age, to pay a bill of exchange accepted by him during his infancy, is binding on him.—4 *Esp. Rep.* 187. In order to revive a debt to which infancy would afford a good answer, an express promise must be proved ; for a mere acknowledgment of the debt, or a promise to pay a part, or even an actual payment of part, will not amount to a confirmation on the part of the infant, so as to render him liable.—2 *Esp. Rep.* 481, 628. 2 *M. & S.* 205, 209.

7. How many kinds of guardianship are there ?

Two : one by common law and the other by statute ; and there were three kinds of guardians at common law, viz., guardian by nature, guardian by nurture, and guardian by socage.—2 *Kent*, 218.

8. Who are guardians by nature ?

The father, and on his death the mother ; and this guardianship extends to the age of twenty-one years of the child, and it extends only to the custody of his person, and it yielded to guardianship in socage.—2 *Kent*, 218. *Co. Litt.* 34, a. *Litt.* § 123. *Co. Litt.* 87, b, 88. *Hargraves*, n. 12. *The King v. Thorpe*, 5 *Mod. R.* 221. *Jackson v. Combs*, 9 *Cow. Rep.* 36. 2 *Wend. Rep.* 153, *S. C.*

9. May not the court of chancery, for a just cause, interpose and control the authority and discretion which the father has in general in the education and management of his children ?

It may.—2 *Kent*, 220.

In *De Mandeville v. De Mandeville*, Lord Eldon restrained a father from doing any act towards removal of his infant child out of the kingdom, and he said that the jurisdiction of the court of chancery to control the right of the father, *prima facie*, to the person of his child, was unquestionably established.—2 *Kent*, 220. He admitted, however, that the jurisdiction was questioned by Mr. Hargrave, 2 *Fonbl. Tr. of Equity*, 234, n. ; *Creuze v. Hunter*, 2 *Cox's Rep.* 242 ; but it was, on the other hand, supported with equal ability by M. Fonblanque, in the case of *Wellesly v. Duke of Beaufort*, 2 *Rus. Rep.* 1. The Lord Chancellor, after a very able and thorough investigation, refused to restore to a father the custody of his infant children, on the ground that his character and immoral conduct rendered him unfit to be their guardian, and the decision was in 1828 affirmed by the House of Lords.

The jurisdiction of chancery, and the fitness of its exercise in that instance was finally established.—2 *Kent*, 221. *Wellesly v. Wellesly*, 1 *Dow. N. S.* 152. That case was accompanied and followed by very profound discussions. In a pamphlet, attributed to the pen of Mr. Beames,

entitled "observation upon the power exercised by the court of chancery, of depriving a father of the custody of his children," the power was deemed very questionable in point of authority as well as of policy. On the other hand, in a treatise published by Mr. Ramm, a Barrister, and in an article in the *Quarterly Review*, No. 77, the policy and wisdom of the jurisdiction, as asserted in the court of chancery and confirmed in the House of Lords, were ably vindicated, and shown to be connected with great moral consideration arising out of the nearest ties of social life. Attempts have been made to control the father's right to the custody of his infant children, by a legacy given by a stranger to an infant, and the appointment by him of a guardian in consequence thereof. But it is settled that a legacy, or a gift to a child, confers no right to control the father's care of the child, and no person can defeat the father's right of guardianship by such means. If, however, the father accedes to his conditions of the gift, and surrenders up his control of the child's education, the court of chancery will not suffer him to retract it.—*Lord Thurlow in Powel v. Cleaver*, 2 Bro. 500. *Colston v. Morris*, 6 Mod. 89. *Lyons v. Blenkin*, 1 Jac. 245. *Note (a) 2 Kent*, 222. Mr. Justice Story observes the cases on this subject are numerous.—*Duke of Beaufort v. Berty*, 1 P. Will. 703. *Whitefield v. Hales*, 12 Ves. 492. *DeMandeville v. DeMandeville*, 10 Ves. 59, 60, 62, 63. *Sheely v. Westbrook*, *Jacobs' R.* 266. *Lyons v. Blenkin*, *Ib.* 245. *Roach v. Garwin*, 1 Dick. R. 88. *Lord Shipbrooke v. Lord Hinchinbrooke*, 2 Dick. 547. *Creuze v. Orby Hunter*, 2 Cox R. 242. *Wellesly v. Duke of Beaufort*, 2 Russ. Rep. 1, 20, 21, S. C. 2 Bligh, (N. S.) p. 128, 129, 130, 141, 142. *Com. Dig. Chancery*, 13, 4, 6. *Ball v. Ball*, 2 Simons' Rep. 35. *Ex parte Mountfort*, 15 Ves. 445. The language "to act as guardian," is here used with reference to the remark of Lord Eldon in *ex parte Mountfort*, (15 Ves. 466,) where his lordship said, "in certain cases the court will, upon petition, without a bill, appoint, not a guardian, which cannot be during the father's life, but a person to act as guardian."—*Note (1.) 2 Story on Eq. Jur.* 575. The jurisdiction, thus asserted, to remove infant children from the custody of their parents, and to superintend their education and maintenance, is admitted to be of extreme delicacy, and of no inconsiderable embarrassment and responsibility. But it is nevertheless a jurisdiction, which seems indispensable to the sound morals, the good order, and the just protection of a civilized society. On a recent occasion after it had been acted upon in chancery for one hundred and fifty years, it was attempted to be brought into question, and was resisted, as unfounded in the true principles of English Jurisprudence. It was, however, confirmed by the House of Lords, with entire unanimity; and on that occasion was sustained by a weight of authority and reasoning rarely equalled.—*Wellesly v. Wellesly*, 3 Bligh (N. S.) 124, 129,—145. S. C. 2 Russ. R. 1, 20, 21. 2 *Story's Equity Jurisprudence*, 476. See also a few subsequent pages on this subject.

10. Does not the general jurisdiction, over every guardian, however appointed, still reside in chancery?

It does, and a guardian appointed by the surrogate, or by will, is as much under the superintendence and control of the court of chancery, and of the power of removal by it, as if he were appointed by the court.

In the matter of *Andrews*, 1 *Johns. Ch. Rep.* 99. *Ex parte Crumb*, 2 *Johns. Ch. Rep.* 439. *Duke of Beaufort v. Berly*, 1 *P. Wms.* 700. *N. Y. Revised Statutes*, Vol. II. p. 152, 153, 220. The rights and powers of guardians over the person and property of their wards are, like the rights and authorities of executors and administrators, strictly local, for they come within the same reasoning and authority.—*Marrell v. Dickey*, *Johns. Ch. Rep.* 156. *Sabin v. Gilman*, 1 *N. H. Rep.* 193. *Armstrong v. Lear*, 12 *Wheaton*, 169. *Story's Comm. on the Conflict of Laws*, 414. Nor have they any authority over the real property of their wards situate in other countries, for such property is governed by the law, *rei sitæ*, *Story's Ibid.*, 414, 417. But a guardian may change the domicile of his ward, so as to affect the right of succession, if it be done in good faith.—*Pottinger v. Wightman*, 3 *Merivale's Rep.* 67. Where the question as to the power of the guardian to transfer the domicile of the minor, is discussed by counsel with great learning, and the competency of the guardian to do it, is shown to rest, not only upon principle, but upon the soundest foreign authority; and *J. Voet*, *Rodenburg Bynkershæck*, *Denisard* and *Pothier*, are cited for the purpose. Sir William Grant gave his unequivocal sanction to the rule. The same principle is adopted in this country.—*Holyoke v. Hawkins*, 5 *Pick. Rep.* 20. 2 *Kent's Commentaries*, p. 228.

11. Were there not common law rights belonging to the guardian in *socage*?

Yes, and they apply to the general guardian at the present day.—*Shepland v. Royle*, *Cro. J.* 98. *Byrne v. Van Hæson*, 4 *Johns. Rep.* 66. *King v. Inhabitants of Oakley*, 10 *East*, 491. 2 *Kent's Comm.* 228.

He may lease during the minority of the ward, and no longer.—*Doe v. Hodgson*, 2 *Wills*, 129, 133. *Field v. Scheffelin*, 7 *Johns. Ch. Rep.* 154. But the guardian's lease of the infant's lands, for a term of years, extending beyond the infant's age of fourteen years, is voidable, provided the infant be then entitled to choose his own guardian, and it may be avoided by the subsequent guardian chosen by the infant.—*Snook v. Sutton*, 5 *Halstead*, 133. 2 *Kent's Comm.* 228.

But he cannot sell without the authority of the courts of chancery. He may sell the personal estate for the purpose of trust without a previous order of the court.—*Field v. Scheffelin*, *Johns. Ch. Rep.* 150. *Ellis v. Essex M. Bridge*, 2 *Pick. Rep.* 243. The sale of personal estate of the infant *cestui que trust*, without a previous order in chancery, if fair, would undoubtedly be good as to the purchaser, but the safer course for the guardian is, to have a previous order in chancery.—2 *Kent's Comm.* p. 228. Whenever it becomes necessary to have the real estate of an infant sold, there must be a guardian specially appointed for that purpose; and the sale is made under the direction of the court of chancery, and the application and disposition of the proceeds are to be under its order, for, in respect to such proceedings, the infant is considered a ward of the court.—*N. Y. Revised Statutes*, Vol. II. p. 194, sec. 170, 180. In Maryland, the chancellor, by a statute provision, may order the real estate descending to infants, to be sold for the payment of debts. And in Ohio,

The courts of common pleas appoint guardians, and may authorize them to sell the real and personal estate of the ward, and all guardians, whether appointed by the courts or testamentary, must account before the court, every two years, but the ward may open the account within two years after he comes of age.—*Act of Maryland, 1785. State of Ohio, Feb. 6, 1824. 2 Kent's Comm. 228.*

See further respecting guardian and ward, *balance of Lecture '30, 2 Kent, 1 Story's Equity Jurisprudence, 312, 313, 314, 315; also Story's Conflict on Laws*, for the Roman law on this subject.

GUARDIANS—Who by the Roman law,	- - -	411.
Authority over the person of a ward confined to the place of his domicil,	-	412, 416, 497.
Authority does not extend to foreign immovable property,	- - -	416, 417.
Whether they may change the national domicil of a ward,	- - -	417.

HOMICIDE.

1. What is homicide ?

It is the killing of any human creature.—*4 Bl. Com. 177. Hawken* defines it to be the killing of a man by a man.—*1 Hawk., c. 8, § 2.*

2. Of what three kinds is homicide ?

Justifiable, excusable, and felonious. The first has no share of guilt at all, the second very little, but the third is the highest crime against the law of nature that man is capable of committing.—*4 Bl. Com. 178.*

3. In what three cases is homicide justifiable ?

1. Where a public officer, by order of the court, executes a convict. 2. Where an officer is endeavoring to take a person charged with felony, in the endeavor kills him. 3. In case of a riot or rebellion, when a person in attempting to suppress it, kills one of the offenders.—*1 Hale, P. C. 494. 1 Hawk. P. C. 161.* Homicide is justifiable in advancement of public justice ; 1. When an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults or resists him. 2. When an officer or any private man, attempts to take another charged with felony, and is resisted, and in the endeavor kills him. 3. In case of a riot. 4. Where a prisoner, in going to jail, endeavors to escape. 5. If trespassers in parks, &c., will not surrender themselves to the keepers. By trial in battle.—*4 Bl. Com. 179. 1 Hale, P. C. 496.* But in the first five cases an apparent necessity must exist on the part of the officers.—*4 Bl. Com. 181.*

4. What is the uniform principle that runs through all laws, as to repelling crimes by homicide ?

It seems to be this, that when a crime in itself capital, is endeavored

to be committed by force, it is lawful to repel that force by the death of the party attempting it.—*Ibid.*

5. In what does excusable differ from justifiable homicide ?

In justifiable homicide no blame whatever is attached to the slayer. But in excusable homicide, some little blame or omission is thereunto attached. Excusable homicide is either *per infortunium*, by misadventure, or, *se defendendo* upon a principle of self-preservation.—*Ibid.*, 182. 2 N. Y. R. S. 160.

To excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant.—*Staundford*, P. C. 16.

6. In what case does homicide *per infortunium* or *misadventure* happen ?

Where a man doing a lawful act, without any intention of hurt, unfortunately kills another.—1 *Hawk.* P. C. 73.

7. What is meant by *chaud* or *chance medley* ?

An affray in the heat of blood.

8. What appears to be the true criterion to distinguish homicide upon *chance medley*, in self-defence, from manslaughter ?

It seems to be this ; when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter ; but if the slayer hath not begun the fight, or (having begun) endeavors to decline any further struggle, and afterwards being closely pressed by his antagonist, kills him, to avoid his own destruction ; this is homicide excusable by self-defence.—*Post.* 277.

9. What is felonious homicide ?

It is killing a human creature, of any age or sex, without justification or excuse. This may be done by killing one's self or another.—4 *Black. Com.* 188.

10. What by the Athenian law was the punishment for self-murder ?

Cutting off the hand which committed the desperate deed.—*Pot. Antig.* B. L. C. 26.

11. What does the law of England consider concerning self-murder ?

That no man hath power to destroy life, but by commission from God, the author of it ; and as the suicide is guilty of a double offence ; one spiritual in invading the prerogative of the Almighty, and rushing into His immediate presence uncalled for ; the other temporal against the king, who has an interest in the preservation of all his subjects ; the law has, therefore, ranked this amongst the highest crimes, making a particular spe-

cies of felony, a felony committed against one's self.—4 *Blackstone's Com.* 189.

12. What kind of homicide will it be when an involuntary killing happens in consequence of an unlawful act?

It will be either murder or manslaughter, according to the nature of the act which occasioned it.—*Ibid.* 192.

13. What circumstance will make involuntary manslaughter amount to murder?

If it be in the prosecution of a felonious intent, or in its consequences naturally tending to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.—*Foster*, 258. 1 *Hawk. P. C.* 84.

14. If a person driving a carriage, happens to kill another, of what crime will he be guilty?

He will be guilty of murder, if he saw, or had timely notice of the mischief likely to ensue, and yet wilfully drove on. If he might have seen the danger, but did not look before him, it will be manslaughter; but if the accident happened in such a manner, that no want of due care could be imputed to the driver, it will be accidental death and excusable homicide.—1 *East, P. C.* 263.

15. Will an assault, however violent, justify killing the assailant under the plea of necessity?

No, unless there is a clear manifestation of a felonious intent.—1 *East, P. C.* 277. 1 *Russell*, 551.

16. Can the sheriff himself lawfully kill those who barely fly from the execution of any civil process?

No.—1 *Hawk.*, c. 28, § 20, *H. P. C.* 37.

17. If a stranger interposes to part the combatants in an affray, giving notice to them of that intention, and then assault them; and in the struggle he should chance to kill, would this be justifiable homicide?

It would, for it is a man's duty to interpose for the preservation of the public peace, and for the prevention of mischief.—*Fost.* 272.

The circumstances wherein these two species of homicide, by misadventure, and self defence, agree, are in the blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehavior in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least, a want of sufficient caution in him who was so unfortunate as to commit it; who is not, therefore, altogether faultless. And, as to the necessity which excuses a man who kills another,

se defendendo, Lord Bacon entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or malefactor.—*Bac. Elm. c. 5*. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed; and since in quarrels both parties may be, and usually are, in some fault, and it can scarcely be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original fault can never be on my side.—2 *Tomlin's Dic.* 102.

18. May an officer, who kills one who resists him in the execution of his office, justify the fact without ever giving back at all?

He may; and even a private person that kills one who feloniously assaults him in the highway, may justify the fact, without ever giving back at all.—1 *Hawk. P. C. c. 29, § 15*. *H. P. C. 41. 3 Inst. 56. Crim. 28, a*.

19. How is murder defined by Mr. Hawkins?

He says, by murder we understand the wilful killing of any subject whomsoever, through malice aforethought, whether the person slain be an Englishman or foreigner.—1 *Hawk. P. C. c. 31, § 3*.

20. If a jailer, knowing a prisoner to be affected by an epidemic distemper, confines another prisoner, against his will, in the same room with him, by which he catches the infection, of which the jailer had notice, and the prisoner dies, of what is he guilty?

He is guilty of felonious killing.—*Stra. 856. 9 St. Tr. 146*.

So to confine a prisoner in a low, damp, unwholesome room, not allowing him the common conveniences which the decencies of nature require, by which the habits of his constitution are so affected as to produce a distemper of which he dies; this is also a felonious homicide.—*Stra. 884. Id. Raym. 1578*.

21. If divers persons be engaged in an unlawful act, and one of them with malice *prepense* against one of his companions, finding an opportunity, kills him; are the rest concerned in the guilt of that act?

No; because they had no connection with the crime in contemplation.—*Kelly, 112. 1 Prin. P. L. 235*.

22. May a person be present when a murder is committed, and yet be neither principal nor accessory?

He may, if he takes no part in it.—1 *Hale, 439. Fost. 350. 1 East, P. C. 296*. But if he does not endeavor to prevent it, or try, afterwards, to apprehend the murderer, he will be guilty of a high misprision.

23. Must a stroke be expressly averred in an indictment for murder?

It must; and in an indictment, stating that the prisoner murdered or

gave a mortal wound, without saying that he struck, is bad.—*Rex v. Long*, 5 Co. Rep. 122, a. 1 *East*, P. C. 342.

24. Must it be stated upon what part of the body the deceased was struck?

It must, and the length and depth of the wound must be shown.—2 *Hale*, P. C. 185, 186. *Hayden*, 4 Co. Rep. 42 a. Where there are several wounds, the length and breadth of each need not be stated.—*Rex v. Mosley*, R. and M. C. C. 97. And see *Young's case*, 4 Co. Rep. 40.

Where the death proceeded from suffocation, from the swelling up of the passage of the throat, and such swelling proceeded from wounds occasioned by forcing something into the throat; it was held sufficient to state in the indictment, that the things were forced into the throat, and the person thereby suffocated; and that the process immediately causing the suffocation—namely, the swelling—need not be stated.—*Red. v. Tye*, R. & R. C. C. 345.

25. Must the death, by the means stated, be positively averred?

It must, and cannot be inferred.—1 *East*, P. C. 341. And where the death is occasioned by a stroke, it must be further alleged, that the prisoner gave the deceased a mortal wound, &c., whereof he died.—2 *Hale*, P. C. 186, *Kel.* 125. *Lad's Case*, *Leach*, 96.

26. Must the time and place of the wound, and of the death, be stated?

It must, in order to show that the deceased died within a year and a day from the cause of the death; in computing which, the day of the act done is reckoned the first; though a precise statement of the day is immaterial, if the party is proved to have died within the limited period.—2 *Inst.* 318. 2 *East*, P. C. 344.

27. If a master refuse his apprentice necessary food or sustenance, or treat him with such continued harshness and severity, as his death is occasioned thereby; what does the law imply, and of what offence will he be guilty?

The law implies malice, and the offence will be murder.—*Leach* 127. 2 *Camp.* 650; and see 1 *Russ.* 621.

28. What will laying noisome and poisonous filth at a man's door, which kills him by corrupting the air, be considered?

It will be considered murder.—1 *Hale*, 432.

29. If a wound itself be not mortal, but by improper application becomes so, and terminates fatally, will the party who inflicted the wound be guilty of murder?

He will not, if it can be clearly shown that the medicine, and not the wound, was the cause of the death.—1 *Hale*, 428. But where the wound

was adequate to produce death, it will not be an excuse to show, that had proper care been taken, a recovery might have been effected.—1 *Hale*, 428.

30. If a person is trespassing upon another, by breaking his hedges, &c., and the owner, upon sight thereof, take up a hedge stake and give him a stroke on the head, whereof he dies; is this murder, and why?

It is, because it is a violent act, beyond the proportion of the provocation.—*H. P. C.*

And, where a boy was upon a tree, in a park, cutting off wood, and the keeper bid him come down, which he did; and then the keeper struck him several blows with a cudgel, and afterwards with a rope, tied him to his horse's tail, and the horse ran away with him and killed him; this was held to be murder out of malice, the boy having come down at the keeper's command.—*Bro. Car.* 139. *H. P. C.*

31. What is to be observed as to killing one whom the person killing intended to hurt in a less degree?

It is to be observed, that wherever a person in cold blood, by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards die thereof, he is guilty of murder, however unwilling he might have been to have gone so far.—1 *Hawk. P. C.*, c. 31, § 38. *Kelyn.* 119. *Mawbridge's Case*, *H. P. C.* 49, 52.

In the case of a husband, who gave a poisoned apple to his wife, who ate not enough of it to kill her, but innocently, and against her husband's will and persuasion, gave part of it to a child, who died thereof; such also was the case of the wife who mixed ratsbane in a potion sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary; who, to vindicate his reputation, tasted it himself, having first stirred it about. Neither is it material in this case, that the stirring of the potion might make the operation of the poison more forcible than it otherwise would have been; for inasmuch as such murderous intention, which of itself perhaps, in strictness, might justly be made punishable with death, proves now, in the event, the cause of the king's losing a subject, it shall be as severely punished as if it had had the intended effect; the missing whereof is not owing to any want of malice, but of power.—1 *Hawk. P. C.*, c. 31, § 42. *Plow. Com.* 474. 9 *Co.* 91.

32. Is it administering of poison, unless the poison be taken into the stomach?

It is not; therefore where a prisoner was indicted for administering poison to E D, with intent to murder her, and the proof was that he gave her a bit of a cake which contained arsenic and sulphate of copper, which she put into her mouth, but which she spit out again, without having swallowed any part of it. Held by the twelve judges that it was not sufficient to convict.—*Rex v. Cadman*, *Car. Cr. Law*, 237.

If a servant put poison into a coffee-pot which contains coffee, and when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her (the mistress's) breakfast, and

the mistress drinks the poisoned coffee, this is a "causing the poison to be taken," within the statute, 9 Geo. 4, c. 31, § 11, and the servant is therefore indictable under that act.

Semble, that this is also an "administering" within that act; as, to constitute an administering, it is not necessary that the poison should be delivered by the hand of the party.—*Rex v. Harley*, 4 C. & P. 369. *Parke*.

A prisoner, who was indicted for mixing sponge with milk, and administering it with intent to poison, the indictment was held insufficient, because it did not aver that the sponge was of a deleterious or poisonous nature.—*Rex v. Elizabeth Powles*, 5 C. & P. 571.

On an indictment for administering a drug to a woman to procure abortion, she not being quick with child; if it appear that the woman was not with child at all, the prisoner must be acquitted, although it appear that the prisoner thought she was with child, and gave her the drug with an intent to destroy such child.—*Rex v. Scudder*, 3 C. & P. 605. *Id.*

33. If an officer is justified in breaking open a door, and in doing so, is resisted and killed, is it murder?

It is; and where he is not justified in breaking open the door, if it is opened to him, or if it be half open, he may then force his way into the house to execute the warrant.—*See R. v. Baker*, 1 Leach, 112.

But if bailiffs come to a house to arrest a person, and the house being locked, they attempt to break in, whereupon the son of the person intended to be arrested, shoots and kills one of them, it is not murder.—*Jones*, 429. *Foster's Rep.* 135, 138, 270, 308, 312, 318, 321.

34. Where two persons, in cold blood, meet and fight on a precedent quarrel, and one of them is killed, is the other guilty of murder?

He is; and cannot help himself by alleging he was first struck by the deceased, or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was only his intent to vindicate his reputation, or he meant not to kill, but only to disarm his adversary; for since he deliberately engaged in an act in defiance of the laws, he must at his peril abide the consequence thereof.—1 *Hawk. P. C.*, c. 31, § 2. 1 *Bulst.* 86, 87. 2 *Bulst.* 147. *Crom.* 22 b. 1 *Rol. Rep.* 360. 3 *Bulst.* 171. *H. P. C.* 48.

From hence it clearly follows, that if two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon or such considerable time after, by which in common intendment it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder.—1 *Hawk. P. C.*, c. 31, § 22. 2 *Inst.* 51. *H. P. C.* 48. *Kelynge*, 59. 1 *Lev.* 180.

And wherever it appears from the whole circumstances of the case, that he who kills another on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse and talk calmly thereon; or perhaps if he has so much consideration as to say that the place wherein the quarrel happens is not conve-

nient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c.—1 *Hawk. P. C. c. 31, § 23. Kelynge, 56. 1 Sid. 177. 1 Lev. 180.*

35. What is necessary in killing to make it a murder?

Malice aforethought. This is the grand criterion which now distinguishes murder from other killing, and this *malice prepense, malicia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general, the dictate of a wicked, depraved, and malignant heart.—*Fosc, 256, une disposition faire un mal chose. 2 Rol. Rep. 461.*

36. Will a witness who takes away the life of an innocent man, by a false oath, be guilty of murder?

No, he is not guilty of murder agreeable to law, and the reason is obvious, which is this; such a distinction in perjury would be more dangerous to society and more repugnant to principles of sound policy, than, in this instance, the apparent want of severity in the law. Few honest witnesses would venture to give evidence against a prisoner tried for his life, if thereby they made themselves liable to be prosecuted as murderers. Although the guilt of him who takes away the life of an innocent man, by a false oath, is much more atrocious than that of an assassin who murders by daggers or by poison. He who destroys by perjury adds to the privation of life, public ignominy, the most excruciating of tortures to an honorable mind; and reduces an innocent family to ruin and infamy; but notwithstanding this is the most horrid of all crimes, yet there is no modern authority to induce us to think that it is murder by the law of England. *Lord Coke* says expressly, it is not holden for murder at this day.—3 *Inst. 48. See also Fost. 132.*

37. Is it murder to work on the imagination so that death ensues, or to call the feelings into so strong an exercise as to produce a fatal malady?

It is not; though such acts if not malicious, spring from a criminal thoughtlessness.—1 *Hale, 429.*

38. If one with his sword drawn, makes a pass at another, whose sword is undrawn, and a combat ensues, and the former be killed, will it be murder?

No, but manslaughter only in the latter; but if the latter fall, it will be murder in the former; for in making the pass before his adversary's sword was drawn, he evinced an intention not to fight with, but to destroy him.—*Kel. 61. Hawk, c. 31, s. 33, 4.*

39. What offence is it wantonly to kill the greatest of malefactors?

Murder.—1 *Hale's P. C. 497.*

If judgment be given by a judge not authorized by lawful commission

and execution be done accordingly, the judge is guilty of murder.—1 *Hawk. P. C.* 70.

Or even if a judge execute his own judgment, or if an officer behead one who is judged to be hanged, and *vice versa*, it is murder.—4 *Black Comm.* 179.

40. How was the bare assault with intent to kill, formerly held?

To be murder; but it is now only a great misdemeanor.—1 *Hale's P. C.* 425.

41. May a man be guilty of murder, although no stroke be struck by himself, or no killing primarily intended?

He may; as if a man does an act of which the probable consequences may be, and eventually are death, such killing may be murder, although no stroke be struck by himself, and no killing be primarily intended; as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died.—1 *Hawk. P. C.* 78.

So also, of the harlot, who laid her child under the leaves of an orchard, where a kite struck it, and killed it.—1 *Hale's P. C.* 452.

So of the parish officers, who shifted a child from parish to parish, till it died for want of care and sustenance.—*Palm.* 545.

42. Within what time after the stroke received, must the party die, in order to make the killing, murder?

Within one year and a day.—4 *Bl. Comm.* 197.

In the computation of which, the whole day upon which the deed was done, shall be reckoned the first.—1 *Hawk. P. C.* 79.

43. What constitutes malice *prepenſe*, *malicia præcogitata*?

Express malice is when one, with a sedate, deliberate mind, kills another; which formed design is evinced by external circumstances discovering that inward intention. In many cases where no malice is expressed, the law will imply it; as where a man wilfully poisons another; in such a deliberate act, the law presumes malice, though no particular enmity can be proved.—1 *Hale's P. C.* 451.

44. What crime is killing, in a duel, held to be?

Deliberate murder, both in the principals and their seconds.—1 *Hawk. P. C.* 82.

Where two or more come together to do an unlawful act, against the king's peace, and one of them kill a man, they are all guilty of the unlawful act, the *malicia præcogitata*, or evil intended beforehand.—1 *Hawk.* 84.

45. What if one intends to do another felony, and undesignedly kills a third man?

It is murder.—*Hale's P. C.* 467

46. What is the general presumption, as to malice, in cases of homicide ?

That all homicide is malicious, unless when justified by the command of the law ; excused on account of accident, or of self-preservation ; or alleviated into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or if voluntary, occasioned by some sudden and sufficiently violent provocation.—*Foster*, 255.

47. What is the punishment for murder ?

Death.—1 *Hale*, *P. C.* 450.

48. What is petit treason ?

An aggravated degree of murder ; as a servant killing his master.—4 *Bl. Comm.* 203.

49. May a person indicted for petit treason, be found guilty of manslaughter ?

He may.—*Foster's P. C.* 106. 1 *Hale's P. C.* 376.

50. In case of an assault, how far does the law absolutely require the person assaulted to retreat, before he turns upon his assailant ?

As far as he conveniently can, either by reason of some wall, ditch, or other impediment ; or as far as the fierceness of the assault will permit him.—1 *Hale's P. C.* 488. *Or it may be so fierce as not to allow him to yield a step without manifest danger of his life, or enormous bodily harm ; and then, in his defence, he may kill his assailant instantly. And this is the doctrine of universal justice as well as of the municipal law.—*Puff.*, *b. 2, c. 5, 13.*

51. If two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, it is murder in A, because of the previous malice.—4 *Bl. Comm.* 185.

If one persuade another to kill himself, and he does it, the adviser is guilty of murder.—*Ibid*, 189.

If one commit suicide in consequence of the counsel and persuasion of another, the latter is guilty of murder, even though the *felo de se* were under sentence of death.—*Commonwealth v. Brown*, 13 *Mass. Rep.* 356, *Engl. Com. Law. Rep.* 15.

In New-York the adviser is guilty of manslaughter in the first degree.

52. Where a peace-officer, who attempts to arrest another, without having sufficient authority, is resisted, and, in the course of that resistance, is killed, to what will the offence amount ?

It will only amount to manslaughter, as where he attempts to arrest on an insufficient charge of felony.—*Craven's Case*, 1 *Moody, C. C.* 132, *Johnson's Case, Id.* 80. So if a peace-officer attempts to execute process

out of his own jurisdiction, and is killed under the like circumstances.—1 *Hale's P. C.* 458. 1 *East, P. C.* 314. So where a peace-officer unlawfully attempts to break open the outer door or window of a house, and he is resisted and killed.—1 *Hale, P. C.* 458.

With regard to the cases of peace-officers killing others in the supposed execution of their duty, it is to be observed that where they act without proper authority, and the party refuses to submit, and death ensues, it will be murder, or manslaughter, according to the circumstances of the case.—*Ibid*, 481.

So where the officer uses a greater degree of violence than is necessary to overcome the resistance of the party, and death ensues, it will be manslaughter in the officer.—1 *East's P. C.* 297.

So where an officer kills a party attempting to make his escape, when arrested on a charge of misdemeanor.—*Foster's Case, Lewin, C. C.* 187.

53. Where a person practising medicine or surgery, whether licensed or unlicensed, is guilty of gross negligence, or criminal inattention, in the course of his employment, and in consequence of such negligence or inattention, death ensues, of what is he guilty?

Manslaughter.—1 *Hale P. C.* 429. 4 *Bl. Comm. C.* 14. *Van Butchell's Case*, 3 *C. & P.* 632. *Williamson's Case*, 3 *C. & P.* 635. *Long's Case*, 4 *C. & P.* 398. *Spiller's Case*, 5 *C. & P.* 333. *Ferguson's Case, Lewin, C. C.* 181.

In cases depending upon provocation it is always material to consider the nature of the weapon used by the prisoner, as tending to show the existence of malice. If a deadly weapon be used, the presumption is, that it was intended to produce death, which will be evidence of malice; but if the weapon was not likely to produce death, that presumption will be wanting.—2 *Lord Raym.* 1498. 1 *Hale, P. C.* 453. *Foster, P. C.* 294. 1 *East, P. C.* 236. 1 *Leach, P. C.* 368.

In order that the provocation may have the effect of reducing the offence to manslaughter, it must appear to have been recent; for if there has been time for passion to subside, and for reason to interfere, the homicide will be murder.—*Foster*, 296. 1 *East, P. C.* 252.

As evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there be proof of express malice at the time of the act committed, the additional circumstance of provocation will not extenuate the offence to manslaughter. In such a case, not even serious blows or struggling will reduce the offence.—1 *Russel*, 440. *Foster*, 132. 1 *East, P. C.* 239.

Although an assault is in general such a provocation, as that if the party struck, strikes again, and death ensues, it is only manslaughter, yet it is not every trivial assault which will furnish such a justification.—1 *East, P. C.* 236. 1 *Russel*, 434. *Foster*, 292.

54. If A happens to be present at a murder, but takes no part in it, nor endeavors to prevent it, nor apprehends the murderer; will this of itself render him either principal or accessory?

It will not, though highly criminal.—*Foster*, 350.

But in the case of assassination, or murder committed in private, the circumstance last stated may be made use of against A, as evidence of consent and concurrence on his part, and in that light should be left to the jury, if he be put upon his trial.—*Foster*, 350.

55. Where the prisoner is charged with committing the act himself, and it appears to have been committed in his presence by a third person, will the indictment be sustained?

It will.—*Chicken's case*, 2 C. & P. 121.

56. Is there any distinction with regard to the law of principal and accessory, between the case of murder by poison, and other modes of killing?

There is. In general, in order to render a party guilty as principal, it is necessary either that he should with his own hand have committed the offence, or that he should have been present, aiding and abetting; but in the case of killing by poison, it is otherwise. If A, with an intent to destroy B, lays poison in his way, and B takes it and dies, A, though absent when the poison is taken, is a principal. So if A had prepared the poison, and delivered it to D, to be administered to B as a medicine, and D, in the absence of A, accordingly administered it, not knowing that it was poison, and B had died of it, A would have been guilty of murder, as principal. For D being innocent, A must have gone unpunished, unless he could be considered as principal. But if D had known of the poison as well as A did, he would have been a principal in the murder, and A would have been an accessory before the fact.—*Foster*, 349. 1 *Russell*, 23.

57. If one of the party provide himself with a deadly weapon beforehand, which he uses in the course of the combat, and kills his adversary, of what is he guilty?

He is guilty of murder, though it would be only manslaughter, if in the heat of the combat, he snatched up the weapon, or had it in his hand at the commencement of the combat, but without an intention of using it.—*Anderson's case*, 1 *Russell*, 447. *Kessall's case*, 1 C. & P. 437. *Snow's case*, 1 *East*, P. C. 224.

Not only may death, in the course of a mutual combat, be heightened to murder by the use of deadly weapons, but by the manner of fighting, as in an up and down fight.—*Thorpe's case*, *Lewin*, C. C. 171.

To reduce the homicide to manslaughter, in these cases, it must appear that no undue advantage was sought or gained on either side.—*Foster*, 295. 1 *East*, P. C. 242.

The lapse of time between the origin and the quarrel is also to be greatly considered, as it may tend to private malice.—*Lynch's case*, 5 C. & P. 324.

But it is not in every case where there has been an old grudge that malice will be presumed.—1 *Hale*, P. C. 452.

58. If a man receive a wound, which is not in itself mortal, but for want of helpful application, or by neglect, it turn to a gangrene or fever, and the gangrene or fever be the immediate cause of the death, of what crime is the defendant guilty?

Either of murder or manslaughter; for that wound, though it was not the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause, the wound was the cause of the gangrene or fever, and consequently, *causa causatæ*.—1 *Hale*, P. C. 428.

Nor will neglect nor disorder in the person who receives the wound excuse the person who gave it.—*Rew's case*, *Kel.* 26.

See also the following cases:—*Johnson's case*, *Lewin*, C. C. 164. *Sharwin's case*, 1 *East*, P. C. 341. *Edward's case*, 6 C. & P. 401. *Culkin's case*, 5 C. & P. 121. *Kelly's case*, 1 *Moody's C. C.* 113. *Ramsay's case*, 1 *Hume*, 183. *Caldwell's case*, *Burnett*, 552. *Edgar's case*, *Alison*, 149.

59. Is it necessary, in order to render the killing murder, that the unlawful act intended, would, had it been effected, have been felony?

It is not. Thus, in the case of the person who gave medicine to a woman, 1 *Hale*, P. C. 429, and of him who put skewers into a woman's womb, with a view in both cases, to produce abortion, whereby the woman was killed; such acts were clearly held murder, though the original attempt, had it succeeded, would only have been a great misdemeanor; for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the persons on whom they were practised.—1 P. C. 230.

The rule above stated, must be taken to extend only to such cases as are *mala in se*.—*Foster*, 259.

60. Will a chemist who negligently supplies a wrong drug, in consequence of which death ensues, be guilty of manslaughter?

He will. The apprentice to a chemist, by mistake, delivered a bottle of laudanum to a customer, who asked for paregoric; and a portion of the laudanum being administered to a child, caused its death. The apprentice being indicted, the jury found him guilty of manslaughter.—*Jessymond's case*, 2 *Lewis*, C. C. 169.

61. What is manslaughter?

It is the unlawful killing of another without malice, either express or implied.—4 *Bl. Com.* 190. 1 *Hale*, P. C. 466.

The distinction between manslaughter and murder consists in the following: in the former, though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter.—1 *East's P. C.* 218. *Foster*, 290. It also differs in this, there can be no accessories before the fact

there having been no time for premeditation.—1 *P. C.* 437. 1 *Russell on Cr.* 485.

If upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter. If sufficient time elapse for the passions to subside and reason to interfere, and the person so provoked afterwards kills the other, it is murder.—1 *Hawk. P. C.* 82.

62. If a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, of what is he guilty?

Of manslaughter.—*Kelynge*, 135.

But in this and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside, and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and accordingly amounts to murder.—*Fost.* 296.

So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot; though this was allowed by the laws of Solon.—*Plutarch's Life of Solon.*

As likewise by the Roman civil law, if the adulterer was found in the husband's own house.

And also among the ancient Goths.—*Stiern. de jure, Goth.*, 1, 3, c. 2.

In England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter.—1 *Hale's P. C.* 486.

It is, however, the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could be no greater provocation.—*Sir T. Raym.* 212.

Manslaughter, therefore, on a sudden provocation, differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor, in the other no necessity at all, it being only a sudden act of revenge.—4 *Bl. Com.* 192.

63. Where a felony has been actually committed, or a dangerous wound inflicted, may a peace-officer justify breaking an entrance door, to apprehend the offender without any warrant?

He may; but in cases of misdemeanors and breach of the peace, a warrant is required.—*Foster*, 320. 1 *Russell*, 529.

In cases of writs an officer is justifiable in breaking open an outer door, upon a *capias* granted on an indictment for any crime whatever, or upon a *capias* to find sureties for the peace, on the warrant of a justice for that purpose.—*Hawk. P. C.* 2. So upon a *capias ulagatum*, or *capias pro fine*. 1 *Hale, P. C.* 459, or upon a *habere facias possessionem*.—*Ib.*

Where a private person lends his assistance to a constable, whether commanded to do so or not, he is under the same protection as the officer.—*Foster, P. C.* 309.

64. May the fact that the party killed was an officer of justice, such as constable or other peace-officer, be proved, generally, by evidence that he acted in that capacity, without strict evidence of his appointment?

It may.—2 *Starkie on Evidence*, 519. Although a special authority to arrest under a precept be alleged in the indictment, if a legal authority to arrest, but not under the precept, be proved, the variance will not be material.—*M'Calley's Case*, 9 *Comm.* 62.

65. In any case whatever, can an outer door be legally broken open, unless a previous notification and demand have been made, and a refusal given?

It cannot.—2 *Starkie on Evidence*, 520.

A peace-officer is not bound, in any case, to part with the warrant, out of his possession.—*East, P. C.* 319.

66. Why cannot an officer, in the execution of civil process, justify the breaking open an outerward door or window?

Because in the language of the books, every man's house is his castle, for safety and repose to himself and his family, but if the officer enter by any open door, he may then lawfully remove every obstruction to the execution of his duty.—*Lee v. Gansell, Couper*, 1.

67. Suppose a stranger take refuge with such family?

He cannot claim the benefit of the sanctuary within it, for it is not his castle.—5 *Co.* 93. 2 *Hale*, 117. 2 *Foster*, 320.

But then it is said, it is at the peril of the officer that the party against whom he has obtained the warrant be found there; for otherwise he will be a trespasser.—1 *Chitty's Criminal Law*, 58.

And this doctrine, as far as it respects civil process, has been recognized in modern decisions.—1 *Marsh. Rep.*, 565. 3 *B. & P.* 223. *Dick. J., Arrest*, 111.

It is necessary to observe, that all the privileges attendant on private dwellings, relate to arrests before indictment, and there is no question whatever that after indictment found, a criminal of any degree may be arrested in any place, and no house is a sanctuary to him.—12 *Co.* 131. 4 *Inst.* 131. *Hawk. B.* 2, c. 14, § 3. *Dick. Just., Arrest*, 111. *Barl. Just., Arrest*.

68. What does a hue and cry give to all parties engaged in it?

The same protection as a warrant, and therefore any one may, upon this proceeding, break open a house, to which the felon has escaped, for all are then required to act as officers.—1 *Chitty on Criminal Law*, 59.

69. What in law will amount to an arrest?

Laying hold of the prisoner and pronouncing words of an arrest.—*Foster*, 320.

70. May bail depute another to take and surrender their principal?

Yes, and the bail, or the person deputed by him for that purpose, may take the principal in another state, or at any time and in any place, and

may after demand of admittance and refusal, break open the door of the principal's house in order to take him.—*Nichols v. Ingersol*, 7 Johns. 146. 5 Esp. C. 172.

71. If an innocent person be indicted of a felony, where no felony was committed, and will not suffer himself to be arrested by an officer who has a warrant, may he be lawfully killed, and why?

He may; for there is a charge against him on record, to which he is bound on his peril to answer.—1 Hawk. P. C., c. 28, § 11, 12. 22 Ass. 55. Bro. Car. 87, 89. S. P. C. 13. 3 Inst. 221.

72. At what age may an infant be guilty of felony?

At the age of fourteen. Yet if it appears to the court and jury he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death under the age of fourteen.—*Dalt. Just.*, c. 147.

By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open; and from thence till the offender was fourteen, it was *aetas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious age of discretion; but under twelve it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime, which he in fact committed. But by the law as it now stands, and has stood, at least ever since the time of Edward the Third, the capacity of doing ill or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases, our maxim is, that *malicia supplet aetatem*. Under seven years of age, indeed, an infant cannot be guilty of felony; for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony. Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companion, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that one hid himself, and the other hid the body he had killed; which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century where a boy of eight years old was tried at Abingdon, for firing two barns; and it appearing that he had *malice*, *revenge*, and *cunning*, he was found guilty, condemned, and hanged accordingly. Thus, also, in very modern times, a boy of ten years old was convicted, on his own confession, of murdering his bedfellow; there appearing in his whole behavior, plain tokens of a mischievous discretion; and as the sparing of his body merely on account of his tender years, might be of dangerous consequences to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges, that he was a proper subject of capital punishment. But in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear, beyond all doubt and contradiction.—*Black. Com.*, Book 4, p. 24.

73. If a man in his sound mind commit an offence, and before arraignment for it he becomes mad, why should not he be arraigned for it? If after he have pleaded he becomes mad, why should not he be tried? If after he be tried, and found guilty, why should not judgment be pronounced? And if, after judgment, why should execution be stayed?

Because if he were in either of these several cases possessed of sound mind, there would be a possibility of his doing something in vindication of his conduct, or in mitigation of the punishment.—*Black. Com.*, b. 4, p. 24.

74. But what if there be any doubt whether the party be *compos* or not, and what if a lunatic have lucid intervals?

The doubt shall be tried by a jury. But if a lunatic have lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency.—*Ibid.* 25.

75. Does drunkenness excuse a crime?

It does not, but is rather an aggravation of the offence.—*Ibid.* 25, 26.

76. Where an act is made felony or treason, does it extend as well to infants as to others?

It does, if above the age of fourteen.—*See Co. Lit.* 247. *Hal. Hist. P. C.* 21, 22.

77. How may any person under sixteen years of age, convicted of any felony, be punished in the state of New-York?

They may be sent to the house of refuge for the reformation of juvenile delinquents, in the city of New-York, instead of being sentenced to imprisonment within a state prison.—2 *R. S.* 701.

78. Should the allegation of time and place, “then and there,” be repeated to every material fact which is issuable and triable?

It should.—5 *T. R.* 620, *Cro. Eliz.* 200. 1 *Chitty on Pleading*, 4th edit. 251. And, therefore, if an indictment state that the defendant at the venue, “made an assault, and with his sword feloniously struck, &c., without saying then and there feloniously struck, it will be insufficient.—*Dyer*, 69, a. 2 *Hale*, 180.

79. Must it appear in the caption, that the indictment was taken upon oath, and the names of all the jurors be stated by whom it is taken?

It must; but it is not usual to insert them in the indictment itself.—2 *Hale*, 165—8. And it must be expressed in the present tense, for if the word, did present, be inserted instead of do, the objection will be fatal.—*Andr.* 162, 163. *Hawk.*, b. 2, c. 22, § 127. *Burn. J.*, *Indictment*.

80. Ought the name and addition of the party, indicted regularly, to be truly inserted in every indictment?

It ought; but whatever mistake may be made in these respects, if the defendant appears and pleads not guilty, he cannot afterwards take advantage of the error.—*Bac. Abr. Misnomer, B. Indictment, G. 2.* 2 *Hale*, 175. *Cro. Car.* 34.

81. Has a plea in abatement always been allowed, when the christian name of the defendant is mistaken? and how was it formerly?

It has.—2 *Hale*, 176, 237, 238. But it seems formerly to have been supposed that an error in the surname was not thus pleadable.—2 *Hale*, 176. *Hawk. b. 2, c. 25, § 69.* It has since been held that a mistake in the latter is equally fatal with one in the former.—10 *East*, 83. *Kel.* 11, 12. It seems, however, if the sound of the name is not affected by the misspelling, the error will not be material.—10 *East*, 84. 16 *East*, 110. *Hawk. b. 2, c. 27, § 81, and see Russ. & Ry. C. C.* 412.

82. If the stroke and death were on different days, when must the murder be laid?

It must be laid on the latter, though the abetting was on the former, for till then no felony was completed.—4 *Co.* 42.

83. To justify a conviction on an indictment charging a woman with the wilful murder of a child, of which she was delivered, and which was born alive, what must be affirmatively shown to satisfy the jury?

That the whole body was brought alive into the world, and it is not sufficient that the child had breathed in the progress of birth.—*Rex v. Poulton*, 5 *C. & P.* 329. *Littledale.*

There must be an independent circulation in the child, or the child cannot be considered alive for the purpose.—*Rex v. Enoch*, 5 *C. & P.* 539. *Parke.*

An unskilful practitioner of midwifery wounded the head of a child, before the child was perfectly born. The child was afterwards alive, but subsequently died of this injury. Held manslaughter, although the child was in *ventre de sa mere* at the time when the wound was given.—*Rex v. Senior*, *M. & C. C.* 344. *Lew. C. C.* 183, *n.*

84. Is forcing a person to do an act which is likely to produce his death, and which does produce it, murder?

It is.—*Rex v. Evans*, 1 *Russ. & M. C.* 426. And threats may constitute such force.—*Id.*

85. If a ship's sentinel shoot a man, because he persist in approaching the ship, when he has been ordered not to do so, will it be murder?

It will, unless such an act was necessary for the ship's safety.—*Rex v. Thomas*, 1 *Russ. & M. C.* 510.

Semble, that where guns are fired by one vessel at another vessel, and

those on board her generally, those guns are to be considered as shot at each individual on board her.—*Rex v. Bailey, R. & R. C. C. 1.*

86. Of what is a party, causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age, guilty?

Of manslaughter.—*Rex v. Marrin, 3 C. & P. 211.*

It was held to be no excuse for killing a man who was out at night, dressed in white, as a ghost, for the purpose of frightening the neighborhood, that he could not otherwise be taken.—*Rex v. Smith, 1 Russ. & M. C. 453.*

All persons who even by their presence encourage a fight, from which death ensues to one of the combatants, although they neither say nor do any thing, are guilty of manslaughter. But if the death be caused, not by blows given in the fight itself, but by the other parties breaking the ring, and striking the deceased with bludgeons, the persons who merely encouraged the fight by their presence, are not answerable.—*Rex v. Murphy, 6 C. & P. 103. Littledale & Bolland.*

A person who was told by the surgeon that she would never recover, said, that she “hoped he would do what he could for her, for the sake of her family.” He again told her that there was no chance of her recovery. Held, that this showed such a degree of hope in her mind, as to render a statement she made inadmissible as a declaration in *articulo mortis*.—*Rex v. Crockett, 4 C. & P. 544. Bosanquet.*

87. On an indictment for malicious cutting, is malice against the individual essential?

It is not, but general malice is sufficient.—*Rex v. Hunt, 1 R. & M. C. C. 93.*

An intent to do grievous bodily harm is sufficient, though the cut is slight, and not in a vital part.—*Id.*

The question is not what the wound is, but what wound was intended.—*Id.*

88. If on a sudden quarrel, blows pass, without any intention to kill or injure any one materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, is it murder?

It is not, but manslaughter only.—*Rex v. Snow, 1 Leach, C. C. 151. East, 244. Rex v. Taylor, 5 Burr. 2793.*

A relative, referring with equal uncertainty to antecedents, will vitiate an indictment.—*Rex v. Graham, 1 Leach, C. C. 87.*

89. In an indictment for a conspiracy, in producing a false certificate in evidence, is it necessary to set forth that the defendants knew at the time of the conspiracy, that the contents of the certificate were false?

It is not; it is sufficient that for such purposes they agreed to certify the facts as true, without knowing it was so.—*Rex v. Macobey, Bart 6, T. R. 619.*

The English law justifies a woman in killing one who attempts to ravish her. And so too, the husband or father, may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other.—1 *Hale P. C.* 485.

The Roman and Jewish laws justified homicide, when committed in defence of the chastity of one's self or relations.—4 *Bl. Comm.* 181.

90. What civil and natural relations are comprehended under the excuse of *se defendendo*?

Master and servant, parent and child, husband and wife.

A warrant to arrest a person charged with a crime, upon the complaint of a private informer, cannot legally issue without the oath of the complainant.—*State of Vermont v. Y. H.*, 1 *Tyl.* 444.

A warrant of arrest, in a criminal case, issued upon rumor and report of the party's guilt, though it recite that there is danger of his escape, before witnesses could be summoned to enable the magistrate to issue it upon oath, is illegal and void on the face of it.—*Connor v. Commonwealth Pa.*, 3 *Binn.* 38.

A sheriff is not obliged to show his precept, either to the person who is to be arrested by it, or to the bystanders.—*State of Vermont*, 2 *Tyler's Rep.* 214. See *State v. Curtis*, *Hayw.* 471.

91. Does drunkenness incapacitate a man from forming a premeditated design to murder?

It does not. But as drunkenness clouds the understanding and excites the passion, it may be evidence of passion only, and of want of malice and design.—*Pennsylvania v. McFall*, *Addison's Rep.* 257.

Where it appears, from the whole evidence, that the crime was at the moment deliberately or intentionally executed, the killing is murder.—*Commonwealth v. Dougherty*, 1 *Brown's Rep.*, *Appendix*, 221.

It is sufficient, if the circumstances of wilfulness and deliberation are proved, though they arose and were generated at the period of the transaction.—*Pennsylvania v. McFall*, *Addison's Rep.* 257. See also, *United States v. Carneall*, *Mason's Rep.* 91.

If the party killing had time to think, and did intend to kill for a minute, as well as an hour or a day, it is wilful and premeditated killing.—*Commonwealth v. Smith*. *Commonwealth v. O'Hara*, *Wharton's Digest*, 148.

The confession of a person on trial for a crime, must be submitted to a jury; if extorted by personal suffering, it ought not to weigh in the least; if produced by fear or flattery, the jury must determine whether it is true or not. But if unsupported by corroborating circumstances, it cannot operate to convict.—2 *Tyler's Rep.* 377.

92. What are the different degrees of guilt, among persons that are capable of offending?

Either principals or accessories.—4 *Bl. Comm.* 34.

93. In what two degrees may a man be a principal in an offence?

In the first and in the second degree.—*Black's Comm.* 34.

94. Who is a principal in the first degree?

A principal in the first degree, is he that is the actor, or actual perpetrator of the crime. And in the second degree, he who is present, aiding and abetting the fact to be committed.—1 *Hale*, 233, 615. 4 *Black. Comm.* 34. 4 *Burr.* 2074.

95. Who is an accessory?

An accessory is he who is not the chief actor in the offence, nor present at its performance, but is in some way concerned therein, either before or after the act committed.—4 *Comm.* 35.

96. How were principals in the second degree formerly denominated and regarded?

As only accessories before the fact.—4 *Burr.* 2074. And it seems, that he who actually committed the crime was alone guilty as principal, and those who were present, aiding and assisting, were but in the nature of accessories, and could not be put upon their trial until the principal was first convicted. But this distinction has long since been exploded.—1 *Hale*, 437.

97. Must the principal in the second degree, be actually, immediately standing by, within sight or hearing of the fact?

He need not. Watching, &c., is enough.—*Foster*, 350.

Whether a person be guilty in the first or second degree, is a question of law.

98. In cases of murder committed in the absence of the murderer, by means which he had prepared beforehand, is the murderer principal in the first or second degree, or accessory?

He is a principal in the first degree.—4 *Bl. Comm.* 34, 35.

99. What reason does the law assign for this?

That in the case of laying a trap for another, whereby he is killed; letting out a wild beast with an intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues; the party offending cannot be called an accessory, that necessarily presupposing a principal; and the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As, therefore, he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal, and if principal, then in the first degree: for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist.—*Kel.* 52. *Foster* 339. *Inst.* 138. 1 *Hale*, P. C. 617.

100. Is it not necessary to make a man principal in murder that he should inflict the mortal wound ?

It is not; it is sufficient if he be present, aiding and abetting the act; nor is it necessary that there should be a particular malice against the deceased; it is sufficient if there be deliberate malignity and depravity in the conduct of the party.—1 *Gal. Rep.* 624.

Where a person stood outside a house, to receive goods which a confederate was stealing within it, he was held a principal.—1 *Ry. & M. C. C.* 96.

And in a case of privately stealing in a shop, if several are acting together, some in the shop and some out of it, and the property is stolen by the hands of one of those who are in the shop, those who are outside are equally guilty as principals.—*Russ. & R. C. C.* 343.

And if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.—*Ibid.*, 446.

But where a man incites a guilty agent to commit murder, and he is neither actually nor constructively present, the perpetrator is the principal felon, and the former only an accessory before the fact.—1 *Hale*, 435. 3 *Inst.* 49.

Persons not present nor sufficiently near to give assistance, are not principals.—*Russ. & R. C. C.* 363.

101. Why are all principals in high treason ?

On account of the heinousness of the crime.—3 *Inst.* 138. 1 *Hale P. C.* 612.

102. Is a mere presence sufficient to constitute the party a principal, without he aids, assists and abets ?

It is not.—1 *Hale*, 439. 2 *Hawk. c.* 29, § 10.

But if several come with intent to do mischief, though only one does it, all the rest are principals in the second degree.—*Ibid.*, 440. *Ibid.*, § 8.

103. In what crimes may there be accessories ?

In petit treason, murder, and felonies, with or without the benefit of clergy; except only in those offences which by judgment of law, are sudden and unpremeditated, as manslaughter, and the like.—1 *Hale*, *P. C.* 615.

The crime of petit treason is now abolished.—See note 15, 4 *Com. p.* 16.

Petit treason is also abolished in New-York.—2 *R. S.* 657.

104. May a principal, in the second degree, be arraigned and tried, before the principal in the first degree has been found guilty ?

He may.—1 *Hale*, 437. 4 *Burr.* 2076. 2 *Hale*, 3. 9 *Com.* 67.

105. In petit larceny, and in all crimes under the degree of felony, why are all principals?

Because the law does not descend to distinguish the different shades of guilt in petit misdemeanors.—3 *Inst.* 139.

106. If a servant instigates a stranger to kill his master, is he guilty of being accessory to petit treason?

He is not; but accessory only to the crime of murder; though, had he been present, and assisting, he would have been guilty as principal of petit treason, and the stranger of murder.—2 *Hawk. P. C.* 315.

107. If several persons are out with the intention of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, are the others to be considered principals in such acts?

They are not.—*Russ. & Ry. C. C.* 99.

And persons not present, nor sufficiently near to give assistance, are not principals.—*Ibid.* 863.

Thus going towards a place where a felony is to be committed, in order to assist in carrying off the property and assisting accordingly, will not make a man a principal if he was at such a distance at the time of the felonious taking as not to be able to assist in it.—*Ibid.* 421.

And where H and S broke open a warehouse and stole thereout thirteen firkins of butter, &c., which they carried along the street thirty yards, and fetched the prisoner, who was apprised of the robbery, and he assisted in carrying the property away, he was considered only as an accessory, and not a principal, the felony being complete before the prisoner interfered.—*Ibid.* 432. *Id.* 333, in notes. 2 *East, P. C.* 767.

Persons privy to the uttering of a forged note by previous concert with the utterer, but who were not present at the time of uttering, or so near as to afford aid or assistance, are not principals, but accessories before the fact.—*Russ. & Ry. C. C.* 25. 2 *East, P. G.* 974, *S. C.* And see *Russ. & Ry. C. C.* 365.

And if several plan the uttering of a forged order for payment of money, and it is uttered accordingly, by one in the absence of the others, the actual utterer is alone the principal.—*Russ. & Ry. C. C.* 449

And it is not sufficient to make a person a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn at which they had put up, a little before he had uttered it, and joined him again in the street a short time after the uttering, and at some little distance from the place of uttering, and ran away when the utterer was apprehended.—*Ibid.* 113.

108. Who is accessory before the fact?

Sir Matthew Hale defines him to be—one who being absent at the time the crime was committed, doth yet procure counsel, or command another to commit a crime.—1 *Hal.* *P. C.* 616.

109. If A command B to burn C's house, and he in so doing commit a robbery, is A accessory to the robbery?

He is not; for that is a thing of a distinct and inconsequential nature.—1 *Hale*, P. C. 617. *Plowden*, 475. *Hawk.*, b. 2, c. 29, § 18. 1 *Hale*, 617. *Com. Dig. Justices*, J., 1 *Fost.* 360.

110. If two encourage each other to murder themselves together, and one does so, but the other fails in the attempt upon himself, is he a principal in the murder of the other?

He is; but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident, before the moment when he meant to destroy himself, it will not be murder in either.—*Russ. & Ry. C. C.* 523.

11. Who is accessory after the fact; and what two things are necessary to make one?

Those who assist a felon, knowing him to be such. To make an accessory *ex post facto*, it is in the first place necessary that he knows of the felony committed. 2. He must receive, relieve, comfort, or assist him.—1 *Hale*, P. C. 118. 2 *Hawk.*, P. C. 319.

112. What if one wound another mortally, and before death ensues, a person assist or relieve the delinquent?

It does not make him accessory to the homicide; for till death ensues, there is no felony committed.—*Foster*, 73.

113. What if the parent assist or relieve the child; the child the parent; the brother the brother; the master the servant; the servant the master; the husband the wife; or the wife the husband; have any of them committed a felony?

The receivers become accessories *ex post facto*, (a *feme covert* excepted.)—3 *Inst.* 103. 2 *Hawk.*, P. C. 320. 1 *Hale*, P. C. 621.

114. If a person be present and aiding and abetting, can he be indicted as an accessory?

He cannot.—1 *Leach*, 515. 3 *P. W.* 476.

115. How are accessories to be treated, considered distinct from principals?

The general rule of the ancient law, (borrowed from the Gothic constitution,) is this, "that accessories shall suffer the same punishment as their principals;" now by the statutes relating to the benefit of clergy, a distinction is made between them.—See *Stiernhook*, 3 *Inst.* 188.

116. For what four reasons, then, are such elaborate distinctions made between accessories and principals?

1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself, when indicted; the commission of actual robbery being quite a different accusation from that of harboring the robber.

2. Because, though by the ancient common law the rule is, as before laid down, that both shall be punished alike, yet now, by the statutes relating to the benefit of clergy, a distinction is made between them.

3. Because formerly, no man could be tried as accessory till after the principal was convicted; or at least, he must be tried at the same time with him; though the law is now much altered.

4. Because, though a man be indicted as accessory, and acquitted, he may afterwards be indicted as principal.—4 *Comm.* 39, 40.

117. If the reputed father of a child unborn, advise the mother to kill it on its birth, and she acts according to his persuasion, is he accessory to the murder?

He is; though the object of his malice was not in being at the time of his advice.—*Dyer*, 168, a. 1 *Hale*, 617. *Dalt. I. C.* 161. 3 *Inst.* 54. *Hawk.*, b. 2, c. 29, § 18. 4 *Bl. Comm.* 37.

118. Is he who commands or counsels another to commit an unlawful act, liable to all the natural and probable consequences which may arise from its perpetration?

He is.—1 *Hale*, 417. *Plowden*, 475. *Hawk.*, b. 2, c. 29, § 18. 1 *Fost.* 370. *Com. Dig. Justices, J.*, 1. Query, this must mean where the direction was to beat violently.—See 1 *Hale*, 442, 3, 4. 1 *East, P. C.* 257, 8, 9. *Kel.* 109, 117.

But the procurer will not be liable, if the agent commit a crime of a different complexion, or upon a different object, than that to which he was incited.—*Plowden*, 475. 1 *Hale*, 616. *Hawk.*, b. 2, c. 29, § 18. *Foster*, 360. *Com. Dig. Justices, J.*, 1. See *Principal in Trespass*, 1 *East*, 106.

If the crime solicited to be committed, be not perpetrated, then the adviser can only be indicted for a misdemeanor.—2 *East, Rep.* 5. And see *Russ. & Ry. C. C.* 106, 7, notes.

119. Is an acquittal of receiving or concealing a felon an acquittal of the felony itself?

It is not.—1 *Hale, P. C.* 625, 626. 2 *Hawk. P. C.* 373. *Foster* 361.

120. Can one acquitted as principal be indicted as accessory either before or after the fact?

Before the fact, it is doubtful, but after the fact, he may.—1 *Hale, P. C.* 625, 626. 2 *Hawk., P. C.* 373. *Foster*, 361.

HUSBAND AND WIFE.

1. Can any contracts at law be made between husband and wife ?

Not without the intervention of trustees ; for she is considered as being *sub potestate viri*, and incapable of contracting with him, and except in special cases, within the cognizance of equity, the contracts which subsisted between them prior to the marriage, are dissolved. The wife cannot convey lands to her husband, though she may release her right of dower to his grantee ; nor can the husband convey lands by deed directly to the wife. But the husband may devise lands to his wife, for the instrument is not to take effect until after his death ; and by a conveyance to uses, he may create a trust in favor of his wife, and equity will decree a performance of the contract by the husband with his wife, for her benefit. 2 *Kent*, 129: *Co. Lit.* 112.

2. What is the general rule as to the rights and liabilities of the husband ?

That he becomes, upon the marriage, entitled to all the goods and chattels of the wife, and to the rents and profits of her lands, and he becomes liable to pay her debts, and perform her contracts.—2 *Kent*, 129.

3. What right in the lands of his wife does the husband acquire by marriage ?

If the wife at the time of marriage be seized of an estate of inheritance in land, the husband, upon the marriage, becomes seized of the freehold *jure uxoris*, and he takes the rents and profits, during their joint lives.—*Co. Lit.* 351, a.

It is a freehold estate in the husband, since it must continue during their joint lives, and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the courtesy.

It will be an estate in him for his own life, if he dies before his wife, and, in that event, she takes the estate again into her own right.

If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate.

If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, as tenant by the courtesy, and, on his death, the estate goes to the wife, or her heirs ; and in all cases, the emblements growing upon the land, at the termination of the husband's estate, go to him, or his representatives.—2 *Kent*, 131.

4. Does not the husband sue in his own name, for an injury to the profits of the land, during the continuance of the life estate ?

He does. But for an injury to the inheritance, the wife must join in the suit, and if the husband dies before recovery, the right of action survives to the wife.—*Weller and others v. Baker*, 2 *Wils. Rep.* 423, 424.

It is there said to be difficult to reconcile the cases, as to the joinder of husband and wife, in actions relating to the land.—2 *Kent*, 131.

5. Is not the husband entitled to the control of his wife ?

He is.—*Manby v. Scott*, *Bridge Rep.* 333. And may secure her on *habeas corpus*, *Rex v. Mead*, 2 *Kenyon's Rep.* 279. And the court will assist him in the lawful exercise of authority over her.—*Evans v. Evans*, 1 *Haggard*, 38.

6. Has a deed by a feme covert, wherein are no words of relinquishing dower, any effect upon her rights ?

It has not. *Per Cur.* A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. In this case, whatever may be conceived of the intention of the demandant, in signing and sealing the deed, there are no words implying her intention to release her claim of dower in the lands conveyed, which must have been to give it that operation. It was merely the deed of the husband, and the wife is not by it barred of her right of dower.—*Catlin v. Ware*, 9 *Mass. Rep.* 209.

7. Will the deed of a feme covert, not acknowledged, pass her interest in the estate ?

It will not.—*Ela v. Card et al.* 2 *N. Hamp. Rep.* 176. *Harvey et al. v. Peck*, 1 *Munf. Va. Rep.* 518. *Jackson v. Kairnes*, 20 *Johns. N. Y. Rep.* 301. *Sexton v. Pickering*, 3 *Rand. Va. Rep.* 468.

8. May not a wife, through the medium of a trustee, convey her real estate to her husband ?

She may, and even without the intervention of trustees.—*McCarter v. The Orphan Asylum Society*, 9 *Cow. N. Y. Rep.* 437. *Carrol v. Lee*, 3 *Gill & Johns. Md. Rep.* 504.

9. Is a constructive possession to be favored ?

It is not.—*Smith 11 Scudder v. S. & R. Penn. Rep.* 325. *Per Cur. Tilghman, Ch. J.* All debts and choses in action belonging to the wife may be reduced into possession by the husband, and then they become his property absolutely ; or he may release them, or assign them for a valuable consideration. But if not reduced into possession by the husband, they survive to the wife ; and considering the unprotected condition in which the wife's property is placed by our law, constructive possession is not to be favored.—*Gregory's Admr. v. Mark's Admr.*, 1 *Rand. Va. Rep.* 355. *Sturginger v. Hannagh et al.*, 2 *Nott & McCord's S. C. Rep.* 147.

10. Can the husband dispose of the wife's equity, without making a suitable provision for her support ?

He cannot, and the court will protect her interest while an infant.—

Udall et al. v. Kenney, 3 Cowen's N.Y. Rep. 590. *Howard v. Moffatt*, 2 Johns. Ch. R. 206.

11. Where the husband lives in a state of adultery with another woman, is he not entitled to the earnings of his wife?

He is.—*Russell v. Brooks*, 7 Pick. Mass. Rep. 65. *Shuttleworth v. Noyes*, 8 Mass. Rep. 229.

It appeared at the trial, that Joshua Swan separated himself from his wife, and went into another town, and lived with a woman in open adultery, but occasionally visited his wife. He became insolvent. His wife accumulated 1000 dollars and some furniture by her industry. And the question was, who was entitled to it—the administrator of the husband, or the administrator of the wife?

The court held, that as it was not shown that the husband had renounced his marital rights, the property acquired by the wife before his death, was his property.

12. Can a wife, by will, devise lands to her husband?

She cannot, unless under special circumstances; for at the time of making it, she is supposed to be under his coercion.—*Black. Com.*, book 1, p. 444.

13. Does a bill in equity lie to compel the defendant to disclose whether he promised to marry?

It does.—*Forrest Rep.* 42.

14. If the intended husband or wife turns out, on inquiry, to be of bad character, is it a sufficient defence for rescinding the engagement?

It is; but a mere suspicion of such fact is not.—*Holt, C. N. P.* 151. 4 *Esp. Rep.* 256.

15. Where there are mutual promises to marry between two persons, one of the age of twenty-one, and the other under that age, will the obligation be equally binding?

It will not; the first is bound by the contract, but on the side of the minor it is voidable; or for a breach of the promise on the part of the person of full age, the minor may maintain an action and recover damages, but no action can be maintained for a similar breach of the contract on the side of the minor.—*Holt v. Ward Clarencieux*, Str. 937. S. C. Füz. 175, 275.

That a husband, even before marriage, may in virtue of the marriage contract, have inchoate rights in the estate of his wife, which, if the marriage is consummated, will be protected by a court of equity against any antecedent contracts, and conveyances, secretly made by the wife, in fraud of those marital rights, may be admitted; but they are mere equities, and in no just sense constitute any legal or equitable estate in her lands or

other property antecedent to his marriage.—*Krane v. Morris's Lessee*, 6 *Peters' Rep.* 598.

If A promise B, that if he and A's daughter marry, "he will endeavor to do her *equal justice* with the rest of his daughters, as fast as it is in his *power with convenience*, and the marriage afterwards had with his consent; the promise is sufficiently certain and obligatory.—*Chichester's Ears. v. Vass's Admrs.*, 1 *Munf. Rep.* 98.

In such case, A has not his *lifetime* to perform it in, but in a *reasonable* time after the marriage (taking into consideration his property and other circumstances), is bound to make an advancement to B and wife, equal to the largest made to his other daughters.—*Ibid.*

A promise in the above mentioned terms, inures to the joint benefit of the husband and wife; and it is not to be satisfied by a conveyance of *lands to the wife*. The husband (to whom the promise was made), has his election to consider it a personal contract, and if he survive the wife, may sue in his own right to recover damages for a breach.—*Ibid.*

16. Will not trusts be treated as executed trusts, where an instrument, designed as a marriage settlement, is final in its character, and the nature and extent of the trust estates, created thereby, are clearly ascertained and accurately defined, so that nothing further remains to be done according to the intention of the parties?

They will; and courts of equity will construe them in the same way as legal estates of the like nature would be construed at law upon the same language.—1 *Fonbl. Eq.*, b. 1, ch. 6, § 7, and note (s). 2 *Fonbl. Eq.*, b. 2, ch. 1, § 5, note (k). *Fearne on Conting. Rem.*, by *Butler*, 145—148, 7th edit. 133—136. 1 *Madd. Ch. Pr.* 360. *Synge v. Hales*, 2 B. & Beatt. 507. *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 550, 551. 4th *Kent's Comm.*, Lect. 61, p. 302, 2d edit., note (1). *Story's Comm. on Equity Jurisprudence*, 246.

Thus if the language of the instrument would give a fee tail to the parents in a legal estate, they will be held entitled to a fee tail in the trust estate. But where no marriage settlement has actually been executed, but mere marriage articles only for a settlement, there courts of equity, when called upon to execute them, will indulge in a wild latitude of interpretation, and will construe the words according to the presumed intention of the parties, most beneficially for the issue of the marriage.

In executing such articles they will put it out of the power of parents to defeat the issue, by requiring, that the limitations in the marriage settlement should be what are called limitations in strict settlement; that is to say, instead of giving the parents a fee tail, the limitations will be made to them for life, with remainders to the first and other sons, &c., in fee tail; and if the articles are applicable to daughters, the like limitations will be made to them also.—1 *Fonbl. Eq.*, b. 1, ch. 6, § 7, and note (n). *Id.*, § 8, note (s). *Fearne on Conting. Rem.*, p. 90—114, by *Butler*, 7th edit. *Earl of Stamford v. Hobart*, 1 Bro. Parl. Cases, 288. *Glenarchy v. Bosville*, *Cas. Temp. Talb.* 3. *Countess of Lincoln v. Duke of Newcastle*, 12 *Vesey*, 218, 227. *Taggart v. Taggart*, 1 Sch. & Lefr. 87. There is a most elaborate note of Mr. Fonblanque (1 *Fonbl. on Eq.*, b. 1, ch. 6, § 8),

note (s.) on this subject, in which the distinction between trusts executed and trusts executory, is fully discussed. I regret that it is too long for an insertion in this place. See also *Atherly on Marriage settlement*, ch. 7, p. 93—105. *Lord Eldon, in Jervoise v. Duke of Northumberland, Jack. & Walk.* 550, 551, has taken notice of the confused and inaccurate sentences in which the words executory trusts and executed trusts are often used. In one sense, all trusts are executory, since the *cestui que trust* may call for a conveyance and execution of the trust. But executory trusts are properly those where something remains to be done to complete the intention of the parties, and their act is not final.—See *Mott v. Baxton*, 7 Ves. 201. *Hopkins v. Hopkins*, 1 Atk. 591. *Story's Com. on Equity Jurisprudence*, note (1.) p. 247. And in cases of executory trusts arising under wills, a similar favorable construction will be made in favor of the issue in carrying them into effect, if the court can clearly see from the terms of the will, that the intention of the testator is to protect the interests of the issue in the same way.—*Leonard v. Earl of Sussex*, 2 Vern. 526. *Papillon v. Voyce*, 2 P. Will. 478. *Glenarthy v. Bossville, Cases Temp. Talb.* 3. 1 *Fonbl. Eq. b. 1, ch. 6, § 8*, and *note (s.) Countess of Lincoln v. Duke of Newcastle*, 12 Vesey, 227, 230, 231, 234. *Fearne on Cont. Rem. by Butler*, p. 113—148, 7th edit. *id.* p. 184. *Green v. Stephens*, 17 Ves. 75, 76. *Carter v. White, Ambler, R.* 670. *Sydney v. Shelly*, 19 Ves. 366. *Stoner v. Curwen*, 5 Sim. R. 264. 2 *Story's Commentaries on Equity Jurisprudence*, p. 246.

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INDICTMENT.

1. What is an indictment ?

It is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury.—*Black. Com. Book 4, p. 302.*

2. What number of the grand jury must agree, in order to find a bill ?
At least twelve.—*Ibid.* 306.

3. What three things must be precisely and sufficiently ascertained in an indictment ?

All indictments must set forth the christian name, surname, and addition of the state and degree, mystery, town or place, and the county, of the offender ; and all this, to identify his person. The time and place are also to be ascertained, by naming the day and township in which the fact was committed.—*Ibid.* 306.

4. In what crimes must particular words of art be used, which are so appropriated by law to express the precise ideas which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it ?

In indictments for murder, it is necessary to say that the party indicted “*murdered*,” not “*killed*,” or “*slew*” the other. In indictments for *felonies*, the word “*feloniously*” must be used ; and also for burglaries, “*burglariously* ;” in rape, the word “*ravished*” is necessary. So also in larcenies, the words “*feloniously* took and carried away,” are necessary in every indictment.—*Ibid.* 307.

5. In what cases in indictments for murder, need not the length and depth of the wound be stated ?

When it goes through the body.—*Ibid.* 307.

6. Can an indictment be tried in the absence of the defendant ?

It cannot.—*Ibid.* 318.

7. What is the proper process to bring in an offender on an indictment for any petty misdemeanor, or on a penal statute ?

A writ of *venire facias*.—*Ibid.* 318.

8. But what happens on an indictment for treason or felony, and what is now the usual practice in the case of misdemeanors ?

A *capias* is the first process ; and now in the case of misdemeanors,

upon certificate of an indictment found, a writ of *capias* is awarded by any judge of the court of king's bench.—*Ib.* 319.

9. For what reason is a bill of indictment said to be an accusation?

For this reason; because the jury that inquires of the offence, doth not receive it, until the party that offers the bill, appearing, subscribes his name and offers his oath for the truth of it.—*Standf. P. C. lib. 2, cap. 23.*

10. May a man be put upon his trial for a capital offence, except on appeal or indictment?

No, or something equivalent thereto.—*H. P. C.* 210.

11. Must the grand jury find the whole in a bill, or reject it?

They must; and cannot find specially for part, &c.—2 *Hawk. P. C.* c. 25, § 2. This rule relates only to cases where the grand jury take upon themselves to find part of the same indictment to be true, and part false; and do not either affirm or deny the facts submitted to their inquiry. But where there are two distinct counts; viz., one for a riot, and the other for an assault, and the grand jury find a true bill as to the assault, and endorse *ignoramus* as to the riot, this finding leaves the indictment as to the count found, just as if there had been originally only that one count.—*Cowp.* 325.

12. If an offence wholly arises from any joint act that is criminal, of several defendants, may they all be charged in one indictment, jointly and severally?

They may, or jointly only; and some of the defendants may be convicted, and others acquitted; for the law looks on the charge as several against each, though the words of it purport a joint charge against all; in other cases, the offences of several persons must be laid several, because the offence of one cannot be the offence of another; and every man ought to answer severally for his own crime.—2 *Hawk. P. C. c.* 25, § 89.

14. May three offences be joined in one indictment?

They may; and the party convicted of one offence, though he is not found guilty of the others. On penal statutes, several things shall not be joined in the indictment, &c., except it be in respect of some one thing, to which all of them have relation.—2 *Hawk. P. C. c.* 25, § 89. 1 *Hal. P. C.* 561, 610.

14. If several commit a robbery, burglary, or murder, may they be indicted for it jointly?

They may.—2 *Hale*, 173; or separately; and so where two or more are guilty of battery, extortion, or the like.—1 *Salk.* 382. And though they have acted separately, if the grievance be the result of the acts of all, they may be indicted jointly for the offence.—1 *B. & Ad.* 874. So where

money was obtained by false pretences, which consisted of words spoken by one defendant in the presence of the others, all of whom acted in concert.—3 *T. R.* 98. So where two persons join in singing a libellous song.—*Burr.* 985; and the same where two join in any other kind of publication of a libel. But if the publication be distinct, as if two book-sellers, who are not partners, sell a libel at their respective shops, they must be separately indicted.

15. Where two are charged jointly with receiving stolen goods, must a joint act of receiving be proved?

It must; for proof that one received in the absence of the other will not suffice.—*R. & M.* 257.

16. Where there are different counts against different individuals, is this a ground for quashing the indictment?

It is, though it seems no cause of demurrer, provided the counts are such in substance as may be joined, and the same judgment passed upon them.—8 *East*, 41.

17. In indictments for bigamy, where may the venue be laid?

It may be laid in the county where the offender was apprehended, or is in custody.—*R. & R.* 48. 9 *G.* 4, c. 31, § 22; or in the county in which the second marriage took place.

18. In indictments for forgery, and uttering forged instruments, where may the venue be laid?

It may be laid, and the offence charged to have been committed in the county in which the offender is apprehended, or is in custody.—1 *W.* 4, c. 66, § 24; or in which the offence was committed.—See *R. & R.* 212.

19. Should indictments be more certain than common pleadings, in law?

They should, because they are more penal, and to be answered with more precision.—*Hill.* 23, *Car. B. R.* They must be precise and certain in every point, and charge some offence in particular, and not a person as an offender in general, or set down goods, &c., stolen, without expressing what goods; and it ought to be laid positively, not by way of recital, &c., or be supplied by implication.—*Cro. Jac.* 19. 1 *Hawk. P. C.*, c. 25.

20. Are acts injurious to private persons indictable?

They are, if they tend to excite violent resentment, and thus produce a breach of the peace.—5 *Cow.* 258.

21. Does an indictment lie for conspiracy to defraud an individual of his property ?

It does.—7 *Cow.* 156.

22. When is a fraud indictable at common law ?

When it is such as affects the public, or is calculated to defraud numbers, and which ordinary care and caution cannot guard against ; as the use of false weights and measures, defrauding another under false tokens, or by conspiracy to cheat. This was the rule laid down by Lord Mansfield, in 2 *Burr.* 1127, and it has ever since been adhered to.

23. What should the captions of indictments set forth ?

They should set forth the court in which, and the jurors by whom, and also the time and place at which the indictment was found, and that the jurors were of the county, city, &c. Also, they must show that the indictment was taken before such a court as had jurisdiction over the offence indicted.—2 *Hawk. P. C.*, c. 25.

24. When may an indictment be amended ?

While the jury who found the bill of indictment are before the court, it may be amended, by their consent, in matter of form, as the name or addition of the party, &c.—*Kel.* 37.

25. If one material part of an indictment is repugnant to, or inconsistent with, another, is the whole void ?

It is ; but where the sense is plain, the court will dispense with a small impropriety in the expression.—2 *Hawk. P. C.* 25.

26. Can one that is convicted upon an erroneous indictment, after the conviction move to have the indictment quashed ?

He cannot ; but he must bring a writ of error to reverse the judgment given against him upon an indictment.—2 *Lil.* 43.

27. If an indictment be good in part, though the other part is bad, will the court quash it ?

It will not ; for if an offence sufficient to maintain the indictment, be well laid, it is good enough, although other facts are ill laid.—*Latch.* 173. *Poph.* 208. 1 *Salk.* 384.

28. Can counts in an indictment be struck out, as they may in an information, and why not ?

They cannot ; for the court cannot strike out that which the grand jury have found.—*Hardr.* 203.

29. In an indictment for forging a bill of exchange, is it necessary to

insert the marks, letters, or figures used in the margin of the bill for ornament, or the more easy detection of forgeries ?

No, as such marks or ciphers form no part of the bill. —3 *Johns. C.* 599. See also 1 *Mass. T. R.* 62.

In the State of New-York, the addition of the estate, degree, or mystery in the indictment is not essential in any case. —2 *N. Y. R. S.* 728.

30. Is it necessary to insert the words, *vi et armis*, where they may fairly be implied from other words, in a complaint, information, or indictment ?

It is not. —3 *Tyler's Rep.* 166.

31. If an indictment for burglary alleges the crime to have been committed between the hours of twelve at night and nine in the evening succeeding, may it be quashed ?

It may, for want of a *noctanter*. —*State of Vermont v. Mather, Chipman*, 32.

32. What must every sufficient indictment set forth ?

It must set forth the day, month, and year, and in cases of burglary, the hour, when the offence was committed ; and though another day may be shown in evidence on trial, yet it must be a day within the term prescribed by the statute of limitations, and the day set forth in the indictment must also be some day within the statute time, or the indictment will be insufficient. —1 *Tyler's Rep.* 295.

33. Is an indictment charging the defendant with stealing a bank note of the value of ten dollars good ?

It is, as the term "bank note" necessarily implies a note for the payment of money. —1 *Mass. T. R.* 340.

An indictment for stealing two notes of the president, directors, and company of the Bank of the United States, is bad. They should be said to be promissory notes for the payment of money. —1 *Binney, Rep.* 201.

In an indictment for murder, it is not necessary so to describe the offence as to show whether it be murder of the first or second degree ; nor is it necessary that the indictment should conclude against the form of the act of assembly. —6 *Binney, Rep.* 179.

INFANTS.

1. What is an infant in law ?

A person under twenty-one years of age ; whose acts are in many cases either void or voidable. —*Co. Lit. lib.* 1, c. 21. *Lib.* 2, c. 28.

2. What are the different ages at which male and female are competent to different purposes ?

A male at twelve years old may take the oath of allegiance ; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and if his discretion be actually proved, may make his testament of his personal estate ; at seventeen may be an executor, and at twenty-one is at his own disposal, and may alien his lands, and goods, and chattels.

A female, also, at seven years of age, may be betrothed, or given in marriage ; at nine is entitled to dower ; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and if proved to have sufficient discretion, may bequeath her personal estate ; at fourteen is at years of legal discretion, and may choose a guardian ; at seventeen may be executrix ; and twenty-one may dispose of herself and her lands.—*Black. Comm., book 1, p. 463.*

3. On what day is full age of male and female completed ?

On the day preceding the anniversary of their birth.—*Ibid*, 463.

4. For what reason may an infant, male, at fourteen, and female at twelve, dispose of their personal estate ?

The reason is, that the common law has appointed no time, it being a matter cognizable in the spiritual court, which herein proceeds according to the civil law, by which law infants at those ages are presumed to have sufficient discretion to make such disposition ; therefore, their testaments in these cases are not to be set aside, or controlled in chancery, or the temporal courts.—1 *Mod.* 315. 2 *Jones*, 210. *Comb.* 50. 1 *Vern.* 469. Though the age of consent to a marriage in an infant male is fourteen, and a female twelve, yet they may marry before, and if they agree thereto, when they attain these ages, the marriage is good, but they cannot disagree before then ; and if one of them be above the age of consent, and the other under such age, the party so above the age may as well disagree as the other, for both must be bound or neither.—*Co. Lit.* 33, 78, 79. 2 *Inst.* 434. 3 *Inst.* 88, 89.

5. If a man marries a woman who is within the age of twelve years, and after the *feme covert* within the age of consent disagrees to the marriage, and after twelve years of age marries another, is the first marriage dissolved ?

It is absolutely dissolved, so that he may take another wife ; for though the disagreement within the age of consent was not sufficient, yet the taking another husband after the age of consent affirms the disagreement, and so the marriage avoided *ab initio*.—1 *Rol. Abr.* 341. See the cases of *Mr. Fitzgerald*, *Lord Decius*, and *Mr. Villars*, 2 *New. Abr.* 119, 120. See also, 1 *Inst.* 33.

6. May a child in *ventre sa mere* be appointed executor ?

He may ; also if there are two or more at a birth, they shall be joint executors, or joint legatees of the thing bequeathed.—*Godolph. Orph. Leg.* 102.

7. Is a devise of lands to an infant *in ventre sa mere*, good ?

It is, and the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time, though formerly it was doubted.—*Vide* 11 *H. 6, c. 13. Bro. Devise*, 32. *Moor*, 177, 637. 2 *Bulls.* 273. *Cro. Eliz.* 423.

8. May an infant *in ventre sa mere* have a distributive share of intestate property ?

It may, even with half blood.—1 *Ves.* 81. It is capable of taking devise of lands.—*Atk.* 117. 1 *Freem.* 244, 293. It takes under a marriage settlement, a provision made for children living at the death of the father.—1 *Ves.* 85. And it has lately been decided, that marriage and the birth of a posthumous child, amount to a revocation of a will executed previous to the marriage.—5 *T. R.* 49. It takes land by descent, though, in that case, the presumptive heir may enter and receive the profits for his own use till the birth of the child, which seems to be the only interest it loses by its situation.—3 *Wils.* 526.

9. How must judicial acts, or acts done by an infant in a court of record, and which he is allowed to avoid, be tried ?

By inspection ; and this must be brought during his minority, that the court by inspection may determine the age of the infant.—*Co. Lit.* 380. *Moor*, 76. 2 *Rol. Ab.* 15. 2 *Inst.* 483.

10. Is it incumbent on a party setting up minority, to prove it ?

It is.—2 *Stark. N. P.* 330.

11. What is the usual course in a criminal case, where an infant is a material witness ?

It is usual for the court to examine him as to his competency, before he goes before the grand jury, and if he be found incompetent, for want of proper instruction, the court will, in its discretion, postpone the trial, in order that he may be instructed, so as to be qualified to take an oath. Neither the testimony of a child without oath, nor evidence of any statement made to another person, is admissible.—*Leach's C. C. L.* 337. *Phil. on Evid.* 19.

12. Are all gifts and grants, &c., of an infant, which do not take effect by delivery of his hand, void ?

They are, and if made to take effect by delivery of his own hand, are voidable by himself and his heirs, and those which shall have his estate. And privies in blood (as the heir general or special) may avoid a conveyance made by their ancestor during his infancy.

13. If a husband and wife are both within age, and they by indenture join in a feoffment, and the husband dies, may the wife enter and avoid the deed ?

She may.—1 *Inst.* 337. Though if there be two joint tenants within age, and one of them makes a feoffment in fee of the moiety during his infancy, and dies, the survivor cannot enter, but the heir of the feoffer may enter into the moiety, &c.—8 *Rep.* 43.

14. Will agreement, &c., made by the infant bind him ?

It will not, though he be within a full day of his age.—*Plowd.* 364.

15. Where an infant enters into a bond, pretending to be of full age, may he avoid it by pleading infancy ?

He may ; yet he may be indicted for a cheat.—*Woods. Inst.* 585.

16. Do debts contracted during infancy, form a good consideration to support a promise made to pay them when a person is of full age ?

They do.—2 *Lev.* 144. 2 *Leon.* 215. And where the defendant pleads infancy, and the plaintiff replies that the defendant confirmed the promise or contract when he was of age, the plaintiff need only prove the promise, and the defendant must discharge himself by proof of the infancy.—1 *T. R.* 648.

17. Is a person liable on a bill of exchange accepted after he was of age ?

He is, though it was drawn while he was an infant.—*Stevens v. Jackson*, 4 *Camp.* 164.

18. If goods are delivered by a vendor to a carrier, while the latter is under age, but they do not reach him till he has attained twenty-one, is infancy a good defence to an action for the price ?

It is ; for the goods vested in him immediately on delivery to the carrier, and he might have been sued immediately. *Griffin v. Langfield*, 3 *Camp.* 118.

19. If an infant be joined with others, in suing in the right of another, by whom may the action be brought ?

By attorney, for they all make but one person in law.—3 *Cro.* 377. But in all cases where an infant is defendant, though he be in another's right, and though joined with others, he must defend by guardian.—2 *Cro.* 289. 1 *Lev.* 894.

20. Is an infant liable in respect of torts, committed by him, as for slander or battery ?

He is.—8 *T. R.* 336. 7 *Bac. Abr. Infancy, H.* And in *detinue* for

goods delivered to him for a particular purpose, and which he has failed to return.—1 *N. R.* 104.

Where the plaintiff declared that having agreed to change mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c., it was held that the defendant might plead his infancy in bar.—2 *Marsh.* 485.

INJUNCTION.

1. What is an injunction ?

An injunction is a writ, issuing by the order and under the seal of a court of equity, and is of two kinds. The one is a writ remedial, among the most ordinary objects of which the following may be enumerated: to stay proceedings in courts of law, in the spiritual courts, courts of admiralty, or in some other court of equity, to restrain the endorsement or negotiation of notes and bills of exchange, the sale of lands, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate, from setting up a term of years, or assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying, or having any intercourse, which the court disapproves of, with a ward; to restrain the commission of every species of waste, to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents, and the violation of copyrights, either by publication or theatrical representation; to suppress the countenance of public or private nuisances; and by the various modes of interpleader, restraint upon multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation.—*Eden on Injunctions*, 1.

INNKEEPERS.

It seems to be clear, that if one who keeps a common inn, refuse either to receive a traveller or a guest into his house, or to find victuals or lodging upon his tendering him a reasonable price for the same, he is not only liable to render damages to the party in action, but may also be indicted and fined at the suit of the king; and it is also said, that he may be compelled by the constable of the town to receive and entertain such person as his guest; and that it is no way material whether he have any sign before his door or not, if he makes it his common business to entertain passengers.—1 *Hawk. P. C.*, c. 78, § 2. 1 *Vent.* 383. *Dalt.*, c. 7. *Salk.* 388. 5 *T. R.* 273.

1. Is an innkeeper under obligation to receive whatever goods his guests bring with them? And is he bound to receive the goods of one who deposits them with him, and to go elsewhere?

He is ; but he is not bound to receive goods upon deposit when the owner is elsewhere, for as he reaps no profit from the deposit of goods, he is not bound to take them under his charge.—*Mo.* 276. *Orl. Bridg.* 227.

2. If an attorney hires a chamber in an inn for a whole term, is the host chargeable with any robbery in it ?

No, because the party is, as it were, a lessee.—*Mo.* 877. So if a guest at an inn deposit his goods in a room which he uses as a warehouse, and of which he has the exclusive possession, the innkeeper is not liable for the loss.—1 *Stark.* 249. *Holt*, 211, *m.* 4 *Maule & S.* 306.

3. If one comes to an inn, and makes a previous contract for lodging for a set time, and doth not eat or drink, is he a guest ?

He is not, but a lodger, and so not under the innkeeper's protection ; but if he eats and drinks, and pays for his diet, it is otherwise.—12 *Mod.* 255.

4. If any theft be committed on a guest that lodgeth in an inn, by the servants of the inn, or by any other person, (not the guest's servant or companion), is the innkeeper answerable in an action on the case ?

He is ; but if the guest be not a traveller, but one of the same town, the master of the inn is not chargeable for his servant's theft ; and if a man is robbed in a private tavern, the master is not chargeable.—8 *Rep.* 32, 3. In this action the innkeeper shall not answer for any thing that is out of his inn, but only for such things as are *infra hospitium*, the words of the writ being *eorum bona et catalla infra hospitium illa existentia*, &c.

But if the innkeeper puts the guest's horse to grass without orders, and the horse be stolen, he shall make it good.—8 *Rep.* 34. Otherwise if the owner do require it.—8 *Coke*, 32.

5. Shall an innkeeper be charged, if there be no default in him or his servants ?

He shall not ; for if he that comes with the guest, or who desires to lodge with him, steal his goods, the host is not chargeable ; though if an innkeeper appoint one to lie with another, he shall answer for him. Although the guest deliver not his goods to the innkeeper to keep, &c., if they be stolen he shall be charged. But not where the hostler requires his guest to put them into such a chamber, under lock and key, if he suffer them to be in an outward court, &c.—2 *Shep. Ab.* 334.

6. How can an innkeeper limit his liability ?

By express agreement or notice.—*Richmond v. Smith*, 8 *B. & C.* 9.

7. May an innkeeper detain a horse for his keeping ?

He may, even if it be but a single night.—8 *Mod.* 172. But he cannot sell him.—1 *Stran. Rep.* 556. 8 *Mod.* 172.

8. If several horses are kept, and all taken away but one, can that one be detained for what is due on account of the others?

He cannot, the lien is only on each horse for its own keeping.—1 *Bulst.* 207, 217. So also the horse cannot be detained for the keeping of the guest.

9. If the horse is once delivered to the owner, is credit given?

Yes, and the innkeeper cannot retake him.—2 *Ro.* 438.

10. If several persons come together in an inn or tavern, and dine there without a special agreement with the innkeeper, is each liable for the whole expense of the dinner?

Yes, unless it is known to the innkeeper that some came there by invitation of others, in which case such persons are not liable even for their own share.—2 *Camp.* 49.

11. Is an innkeeper entitled to feed the horse during its detention, and to charge the amount in his account?

He is, and that notwithstanding an order from the owner not to do so, for otherwise his security would fail.—*Mod.* 876, 877. 8 *Modern Rep.* 172. *Stra.* 556.

If an innkeeper receives a stage coach and from time to time suffers the coach and horses to depart without payment, he gives credit to the owners, and cannot afterwards detain the coach and horses for what was formerly due.—*Stra.* 556.

12. May a livery stable keeper detain horses for their feed as an innkeeper?

No; for he is not bound to receive them, and when he does so, it is on a special contract. But if a party agree not to take away horses till they are paid for, and afterwards under pretence of a ride, take them elsewhere, the stable keeper may re-take and keep them till his charge is paid.

INSOLVENCY.

1. What is insolvency in a technical sense?

It means that all the debtor's property has passed from him. A mere inability of the debtor to pay his debts is not an insolvency.—*United States v. Hooe*, 3 *Cranch*, 73. *Conard v. Atlantic Ins. Co.*, 1 *Peters' R. S. C.* 439.

A discharge under the insolvent laws of the United States, is confined in its effects altogether to the particular cause; and even so to that, does not exempt the debtor's present effects, or future acquisition from the process of the law; nor is his person exempt from confinement for the same process of the law; nor is his person exempt from confinement for the same debt, should he be detected in a fraud upon the creditor.—*Bank of the United States v. Weisinger*, 2 *Peters' S. C. Rep.* 353.

OF THE LAW OF INSURANCE.

1. What is marine insurance?

It is a contract whereby one party, for a stipulated premium, undertakes to indemnify the other against certain perils, or sea risks, to which his ship, freight and cargo, or some of them, may be exposed, during a certain voyage, or a fixed period of time.—3 *Kent's Comm.* 253, 3d edit.

OF THE PARTIES TO THE CONTRACT.

1. Who may be insured

All persons, whether aliens or natives, may be insured, with the exception of alien enemies, for it is a contract authorized by the general law and usages of nations. *Pothier terms it a contract du Droit des Gens.*—*Brandon v. Nesbit*, 6 *Term Rep.* 317. *Bristow v. Towers*, 6 *Term Rep.* 35. A distinction was taken in *Bell v. Gibson*, 1 *Boss. & Pull.* 345. where it was held that the insurance of goods purchased in an enemy's country during war, by a British agent, and shipped for British subjects, was lawful insurance. But in *Furtado v. Rodgers*, 3 *Boss. & Pull.* 191, every distinction of that kind was abandoned. And in case of insurance on French property previous to war, they were held not to cover a loss by British capture after the war was renewed, even though the action was not brought until after the restoration of peace.—3 *Kent's Commentaries*, 254. The ordinances of Barcelona, as early as 1484, declared such insurance void. *Consulat de la mer, per Boucher, tome 2, 717.* See also, *Le Guidon, ch. 2, § 5, in Cleirac, Us. et Coutumes de la mer, 197, edit. 1671.* *Ord. of Stockholm of 1756.* 2 *Magens*, 257. *Ord. of the States General of the Netherlands, in 1622, 1657, 1665 and 1689, cited in Bynk. Quæs. J. Pub., lib. 1, ch. 21.* *Emerigon, des Ass., tome 1, 128.* *Bynkershoek*, in a chapter devoted to the consideration of this question, concludes, that the reason of war absolutely requires the prohibition of insurance of enemy's property; because, by assuming such risks, we promote the maritime commerce of the enemy. *Valin considered* that insuring enemy's property and trading with the enemy was substantially the same thing.—*Valin's Com. tome 2, 32.* See 1 *Kent Com. Lec. 4*, how far a foreign domicil communicates to a citizen the disabilities of an alien enemy.

2. What is the rule as to a native subject's right to insure as trustee, for an enemy?

The rule in England is, that although the policy is entered into in the name of a British subject, as trustee for the persons interested, though the property insured is of British manufacture, and exported from this country—*Brandon v. Nesbit*, 6 *Term Rep.* 23. *Bristow v. Towers*, 6 *T. R.* 35. *Kensington v. Englis*, 8 *East*, 289, 290. *Ex parte Lee*, 13 *Ves. Jun.* 64. 6 *Term Rep.* 25—though the contracting parties are ignorant, at the time

of entering into the contract, of the relation of hostility superinduced by the acts of their respective sovereigns—*Orm v. Bruce*, 12 East, 225, 227—though the war breaks out after the effecting of the policy and after the commencement of the risk, yet in no instance can the policy be enforced, or the interest insured be protected, whilst it remains impressed with the character of hostility.—*Brandon v. Curling*, 4 East, 410. *Gamba v. Le Mesurier*, 4 East, 407. *Kellner v. Le Mesurier*, 4 East, 403, 404. *Touting v. Hubbard*, 3 Boss. & Pull. 299, 300, 301. *Lubbock v. Potts*, 7 East, 451. *Flindt v. Waters*, 15 East, 265, 266. 9 East, 292. *Blanche v. Fletcher*, Doug. 241. *Dict. of Lord Mansfield*, contra, *Furtado v. Rodgers*, 3 Boss. & Pull. 201, confines the doctrine to losses by British capture.—*Abb. Shipp.* 439, 440. But see cases *supra*, in 2 East, 385, the objection was not taken.

3. What is the effect of the royal license to an alien enemy to trade?

The rule is that the license shall receive a liberal construction to effectuate the purposes for which it was intended, and that the terms which it contains are not to be limited in construction where the adventure contemplated has been fairly pursued.—*The Cosmopolite*, 4 Rob. Rep., 8 *Grotius*, b. 3, ch. 21, § 14. *Stewart's Vice Adm. Rep.* 360. *Schroeder v. Vauv*, 15 East's Rep. 52. 3 Camp., N. P. Rep. 83. 1 Edward, Adm. R. 95. A license of this nature, then, legalizing a particular adventure, incidentally legalizes all the measures necessary to be adopted for its due and effectual prosecution; it, therefore, impliedly allows a person whose commerce it authorized, although he be an alien enemy, to protect his interest by insurance, and a British agent, in whose name the insurance is effected, may bring an action upon the policy, even during the continuance of the war.—*Kensington v. Inglis*, 8 East, 273. *Flindt v. Scott*, 5 Taunt. 705. *De Tastet v. Taylor*, 4 Taunt. 248. *Fayle v. Bourdillon*, 3 Taunt. 546. *Hullman v. Whitmore*, 3 M. & S. 337. 7 Taunt. 448. *Usparicha v. Noble*, 13 East, 332. 3 Taunt. 568. 5 Taunt. 700, 701. *Edw. Lead. Dec. Brit. Luc.* 20, cited 3 Taunt. 558. *Hullman v. Whitmore*, 3 M. & S. 337. *Rucher v. Ansley*, 5 M. & S. 25. *Flindt v. Scott*, 5 Taunt. 674. *Anthony v. Moline*, 5 Taunt. 711, 715. *Schakony v. Andrews*, 5 Taunt. 716, 719. *Robinson v. Morris*, 5 Taunt. 720, 725. *Bazett v. Meyer*, 5 Taunt. 824, 828, 829. *Feize v. Bell*, 4 Taunt. 4. *Fayle v. Bourdillon*, 3 Taunt. 546. *Robinson v. Touray*, 1 M. & S. 217. 3 Camp. 158. S. C. not S. P. *Hagedorn v. Reed*, 1 M. & S. 567. But see *Hagedorn v. Bazett*, 2 M. & S. 100, as to which see the *Observations*, 5 M. & S. 31. *Mennet v. Bonham*, 15 East, 477. *Flindt v. Crockett*, 15 East, 522.

4. What is it incumbent on a person insured under a license of this description to show in order to bring himself within its protection?

He must connect himself in some manner with the license, which may be done by showing that the person to whom it was granted was his agent.—*Busk v. Bell*, 16 East, 3. *Feize v. Neunham*, 16 East, 197. *Robinson v. Morris*, 5 Taunt. 720. *Robison v. Janson*, 12 East, 223.

Barlow v. McIntosh, 12 *East*, 311. *Butler v. Alnutt*, 1 *Stark*. 222. A misdescription in the addition of the person to whom the license is granted, as for instance, stating his residence to be in *Heligoland* instead of London, has been held to invalidate the license.—*Klingender v. Bond*, 14 *East*, 484. 1 *Kent's Comm.* 164.

5. Who may be insurers ?

With us the rule of common law prevails, and any individuals, or companies, or partnerships, may lawfully become insurers; and we have no incorporated companies, like those of the *Royal Exchange Assurance*, and the London Assurance Companies, with the monopoly or exclusive right of making insurance as a company or partnership on a joint capital. Each part owner may insure for himself, and may act his pleasure as to the insurance of his individual proportion of interest.—3 *Kent's Commentaries*, 256. One tenant, in common, has no right, merely in virtue of such relation, to cause insurance to be made on property on board for his co-tenant. Nor has a master of a vessel a right, merely as a master, to procure insurance for the owners.—*Vide Buckley v. Derby Fishing Comp.* 1 *Conn. Rep.* 571. *Foster v. The U. S. Ins. Co.*, 11 *Pick. Mass. Rep.* 85.

OF THE TERMS AND SUBJECT OF THE POLICY.

1. What is the rule where a particular ship is specified in the policy ?

That it becomes a part of the contract, and no other ship can be substituted without necessity, but the cargo may be shifted from one ship to another, if it be done from necessity, and the insurer of it will still be liable.—3 *Kent's Comm.* 257.

2. What is included in a policy of insurance by the words, "ship's body ?"

An insurance on the body of a ship, sweeps in, by the comprehensiveness of the expression, whatever is appurtenant to the ship. This is the doctrine taught in all the continental writers on insurance, as well as in the English law.—*Emerigon*, tome 1, 423. *Boulay Paty*, tome 3, 377. *Plantamour v. Staples*, 1 *Term Rep.* 611, note. An insurance on a ship means *prima facie* the legal interest in the vessel, and not the mere equitable interest, and if the policy be intended to cover the equitable interest only, that interest ought to be disclosed to the insurer.—*Ohl v. Eagle Ins. Co.*, 4 *Mason's Rep.* 390.

3. Will a policy be valid without naming the ship ?

It will; an insurance will be valid without naming the ship, as upon goods on board *any ship or ships*; and it becomes sometimes a nice question as to the application of the loss, when there are two or more policies of that loose description on different parcels of goods. *Emerigon*, tome 1, 173. *Kewley v. Ryan*, 2 *H. Blacks.* 343. *Hechman v. Offrey*, *Ibid.*, 345, note.

4. What if one partner insures in his own name only?

'The policy will cover his undivided interest in the partnership and no more. If the policy has the words, *and whomsoever it may concern*, then it will cover the whole partnership interest.—*Lawrence v. Sebor*, 2 *Caines' Rep.* 203. And *Valin and Boulay Paty*, think it covers the whole, if the policy be generally on his goods.—*Valin*, tome 2, 34. *Boulay Paty*, tome 3, 386. On such a policy an action may be maintained by any one of the owners whose interest it was intended to be insured by it. It will cover a person who has but a special interest as by lien or otherwise.—*The Pacific Insurance Co. v. Catlett*, 1 *Wend. Rep.* 561, S. C. 4 *Ibid.* 75. Those general words, *whom it may concern*, will only apply to the person having an interest in the subject insured, and who was in the contemplation of the contract.—*Newson v. Douglas*, 7 *Johns. & Har. Rep.* 417. *Beaudway v. Union Ins. Co.*, 2 *Wash. C. C. R.* 391. But a policy may be applied to cover the interest intended to be insured, though the owner of it was not known to the parties, provided the terms of the policy will permit it.—*Buck v. Chest. Ins. Co.*, 1 *Peters' S. C. Rep.* 151.

If it clearly appears that the owner effected insurance on joint account, and the language of the policy is for whom it may concern, or for account of the owners, any one having an interest may claim under the policy. But where the policy contains no words importing interest in any but the person effecting it, he *alone* can claim.—*Ibid.*

So if made for the benefit of a third person, without his knowledge, if subsequently ratified by him, such third person may sue on it.—*Bridge v. Niag. Ins. Co.*, 1 *Hall*, 246. *Pacific Ins. Co. v. Hatlett*, 4 *Wend.* 75.

A party may insure his individual interest in a vessel without specifying that interest. It is sufficient if he have an insurable interest to the amount in question.—*Turner v. Burrows*, 5 *Wend.* 541.

A policy in the name of one joint owner, "as property may appear," (omitting the clause stating the insurance to be for the benefit of all concerned,) does not cover the interest of another joint owner.—*Graves v. Boston Mar. Ins. Co.*, 2 *Cranch's Rep.* 419. *Dumas v. Jones*, 4 *Mass. Rep.* 649.

5. What is the effect of the words "lost" or "not lost"?

Those words are said to be peculiar to the English and American policies, and though it is said that without them the policy would be void, if the subject was lost when the insurance was made.—5 *Burr. R.* 2803, 2804. *Park on Insurance*, 31.

The point may well be doubted, inasmuch as all the continental authorities hold such insurance to be valid, if made in ignorance of the existing loss.—*Rota Genoe Decisio*, 42, n. 8. *Roccus de Ass.*, n. 51. *Emerigon*, tome 2, 121. *Ruggles v. Gen. Int. Ins. Co.*, 5 *Mason's Rep.* 74. *Kohne v. Ins. Co. of North America*, 1 *Wash. C. C. Rep.* 93.

6. What is the effect of a policy made for *whomsoever it may concern*?

If a policy be for A. B, or *whomsoever it may concern*, and made by an agent without any warranty or representation of national character, it

will cover the interest of any person, whether a citizen or a foreigner, who has authorized the insurance.—*Seamans v. Loring*, 1 *Mason's Rep.* 123. A policy, "for whom it may concern," will, in ordinary cases, cover bel-ligerent property.—*Buck & Heprick v. The Cheapside Insurance Co.*, 1 *Peters' S. C. Rep.* 159.

A policy on a voyage from abroad may be good, though it omits to name the ship, or master, or port of discharge, or consignee, or to specify and designate the nature or species of the cargo, for all these may be unknown to the insured when he applied for the insurance.—*Le Guidon*, ch. 15, art. 2. *Ord. de la Mar. tit. des Assurances*, art. 4. *Code de Commerce*, art. 337. *Boulay Paty, cours de droit, com. tome 3*, 411, 412.

The policy, in such a case, will be good to the amount insured, if effects be laden in any ship, to any port, and to any consignee. The text writers, however, require cargo of the same form and species, and the policy will not cover the same thing under a new modification, if the essential character of the article has changed; as a policy on a cargo of wheat will not cover a cargo of flour.—*Boulay Paty*, tome 3, 388, 389.

A policy on a cargo, or goods generally, will not cover goods stowed on deck, nor live stock, unless there be some local mercantile usage to give extension to the terms.—*Lenox v. United Insurance Co.*, 3 *Johnson's Cases*, 178. *Allegre v. Maryland Ins. Co.*, 2 *Gill. & Johnson*, 136. *Wolcott v. Eagle Ins. Co.*, 4 *Pick.* 429. And a policy may be on bills of exchange, if they truly exist.—*Palmer v. Pratt*, 3 *Bing.* 485, 3 *Kent's Commentaries*, 259.

7. What is the effect of a policy, effected by an agent, without the knowledge of his principal?

If the principal afterwards adopts the act, the insurer is bound, and cannot object to the want of authority.—*Bridge v. Niagara Ins. C. of N. Y.*, 1 *Hall's N. Y. Rep.* 247. But if A insures the property of B, without authority, (and the master of a vessel, merely as master or part owner, as such, have no such authority,) and without any adoption of the act by B, the contract is not binding.—*Beel v. Humphreys*, 2 *Starkie*, 345. *French v. Backhouse*, 5 *Burr.* 2727. *Foster v. U. S. Ins. Co.*, 11 *Pick.* 85. 3 *Kent's Com.* 261.

8. What if an agent imperfectly execute, or neglect to execute an order to insure?

He is answerable, as if he himself was the insurer, and is entitled to the premium.—*Buller, J., in Wallace v. Telfair*, 2 *Term R.* 188. *Smith v. Lascalles*, 2 *Term Rep.* 188. *De Tastet v. Crousillat*, 2 *Washg. Circ. Rep.* 132. *Morris v. Summerhill*, *ibid.*, 203. A merchant who has effects of his foreign correspondent in hand, or who is in the habit of insuring for him, is bound to comply with an order to insure, and the order may be implied, in some cases, from the previous course of dealing between the parties. A commission merchant is not bound to insure for the benefit of his principal goods consigned to him for sale, without some express or implied directions to that effect; though he has such an interest

in the goods, that he *may* insure them to their full value, in his own name.—*Brisban v. Boyd*, 4 *Paige*, 17. 3 *Kent's Commentaries*, 261.

9. What is the rule as to the assignment of a policy ?

If the subject matter of the policy be assigned, the policy may also be assigned, so as to give a right of action to the assignee.—2 *Condy's Marshall on Insurance*, 800, 803, 805. 1 *Phillips on Insurance*, 11. *Carter v. Union Insurance Comp.*, 1 *Johns. Ch. Rep.* 463. *Wakefield v. Martin*, 3 *Mass. Rep.* 558. *Bell v. Smith*, 5 *Barnw. & Cress. Rep.* 188. *Ashhurst, J., in Delancy v. Stoddart*, 1 *Term Rep.* 26. *Craig v. The United States Insurance Co.*, 1 *Peters' Cir. Rep.* 410. A clause in a policy, that it shall be void, if assigned without the consent, in writing, of the insurer, is taken strictly, and means an effectual transfer or pledge of the particular policy.

10. What is the effect of the word *property* in a policy ?

It comprehends any interest which the insured may have in this subject. In *Holebrook v. Brown*, 2 *Mass. Rep.* 280, the court observed, the word “property,” is very comprehensive, and there can be no doubt that it was the intention of the parties to cover the interest of *Holebrook*, the master, whether it was to be considered as commissions, or as a specific proportion of the cargo, belonging exclusively to him; and where the policy describes the property as being “goods and merchandise,” those terms will include coins and jewels.—*De Costa v. Frith*, 4 *Burr.* 1966.

The words “goods and merchandise,” mentioned in the policy, apply to those only on board the vessel; and must be stowed consistently with the nature of the commodity.—*De Costa v. Edmunds*, 4 *Cawp.* 142.

11. What is comprehended under the term cargo ?

By a policy on a vessel and cargo, a party having a lien for advances, or a special ownership and possession, may protect such interest in the vessel and cargo.—*Seaman v. Loring*, 1 *Mason's Rep.* 128. Live animals, and the freight of them, are not protected by a policy, in general terms, upon “*cargo and freight*,” but are the subjects of a particular insurance; so goods laden on deck are not protected by those terms. So of provender put on board for the sustenance of live animals on the voyage, although with an intention of selling, at the termination of the voyage, any surplus which may remain unconsumed. But corn, put on board by the owner of the ship, to be invested by the captain in merchandise, and the freight of such corn, are protected by a policy on “*cargo or freight*.”—*Wolcott v. Eagle Insurance Company*, 4 *Pick.* 429.

The general description of goods, &c., is sufficient to include a cargo of gold or silver, coined or uncoined, pearls and other jewels, provided the conveyance of them be lawful.—*De Costa v. Frith*, 4 *Burr.* 1966. *Thomas v. Royal Exchange Assurance Company*, *Dampire, J., Cornwall Summer Assizes*, 1815. *Man. Index*, 164, where it was ruled that an insurance of goods and merchandise will cover dollars, if entered at the

custom house, but not bank notes.—*S. C. not S. P.*, 1 *Price*, 195. But it seems advisable to specify jewels, &c., and by *Geo. III.*, c. 86, § 3, the master is not liable for the value of gold, silver, precious stones, &c., unless the shipper declare their nature, quality, and value. But the jewels and other ornaments which are worn by persons on board, and which are not considered as forming a part of the cargo, nor liable to contribute to a general average, would not be included in a general policy on goods.—*Marsh. Ins.* 320. *Park.* 27. And see 1 *M.* 298, as to the baggage of a passenger. And in one case, policy effected on behalf of a captain in the East India trade on “goods, specie, and effects,” was held sufficient to cover money expended by the captain in the course of the voyage for the use of the vessel, and for which he charged respondentia interest; an express usage being proved, which governed the decision.—*Gregory v. Christie*, *Park. Ins.*, 14. *Hughes on Insurance*, 97.

12. What is the effect of a wrong description of goods in the policy?

If it was made by mistake, and it is immaterial to the risk, whether the description was by one mark or another, the variance is immaterial.—*Ruan v. Gardner*, 1 *Wash. U. S. C. C. Rep.* 145.

13. What is the rule as to altering mistakes in a policy?

That a mistake in a policy may be *altered by consent*, after it is underwritten.—*Bates v. Grabham*, *Salk.* 144. In a case where the clerk of the underwriter had been guilty of a mistake; parol was not admissible to prove that the parties understood it as covering sea risks only.—*Levy v. Merrill*, 4 *Greenleaf*, 480. A court of equity will not interfere to amend the policy according to the intentions of the parties, unless there be clear and satisfactory proof of the mistake.—*Graves v. Boston Marine Insurance Comp.*, 2 *Cranch's Rep.* 419. *Lyman v. United Insurance Company*, 2 *Johns. Ch.* 63. *S. C.* 17 *Johns. Rep.* Equity does not interpose in insurance cases, unless there be some extraordinary circumstances.—*Charleston Insur. Comp. v. Potter*, 3 *Dessau*. 6. The slip or application for insurance is inadmissible to show the parties' intention. In a court of law it is proper evidence only to show misrepresentation. In equity it may be used to correct the policy.—*Dow v. Whetton*, 8 *Wend.* 160. Evidence may be given to show that, according to usage of insurance companies, the word cargo covers live stock.—*Allegre v. Maryland Insurance Company*, 2 *Gill & Johns.* 136.

A description of a building, “as a frame house filled with bricks,” may be explained by proof of a *usage*, as between insurers and insured, as to their particular meaning.—*Fowler v. Aetna Insurance Co.*, 7 *Wend.* 270. On a policy on *goods out and proceeds home*, evidence may be given, that by usage the words *proceeds* covers the *identical goods* brought back again.—*Dow v. Whetton*, 8 *Wend.* 160.

The oil and other products of a whaling voyage, are covered by a policy on cargo. *Quere*, as to the outfit.—*Allegre v. Maryland Ins. Co.* 2 *Gill & Johns.* 136. *Paddock v. Franklin Insurance Co.*, 11 *Wend.* 227. By referring to the case of *Brown v. Stapleton et al.*, 4 *Bing.* 119, cited

2 *Phil. on Insurance*, chap. 15. § 12, and in *Stev. & Ben. on Av.* 44, it may be concluded that outfits in a case as above would not be included under an insurance on cargo.

14. What is comprehended under the word furniture ?

All the necessary apparel of a ship. Provisions which are necessary for the use of the ship's crew, are comprehended under, and protected by a policy on the ship and furniture.—*Brough v. Whitmore*, 4 *J. R.* 206. Profits, freight, and bottomry interest must be insured *eo nomine*.—*Abbott v. Sebor*, 3 *Johns. Cases*, 39. *Tom v. Smith*, 3 *Caines' Rep.* 245. A bottomry interest is not covered by an insurance of the vessel, unless expressly mentioned in the policy.—*Robertson v. United Insurance Company*, 2 *Johns. Cases*, 250. *Kenney v. Clarkson*, 1 *Johns. Rep.* 385.

15. Are insurances by a neutral, on goods usually denominated contraband of war, valid ?

They are, for it is not deemed unlawful for a neutral to be engaged in a contraband trade. It is a commercial adventure which no neutral nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. But on the other hand, all articles contraband of war, are subject to seizure *in transitu*, by the belligerent cruisers, and so far it is a case of imperfect right.—3 *Kent's Commentaries*, 267. See 1 *Id.* 142, and the authorities there cited, and in addition thereunto, see *Seton & Co. v. Low*, 1 *Johns. Cases*, 1. *Barker v. Blake*, 9 *East's Rep.* 283. *Pond v. Smith*, 4 *Conn. Rep.* 297. *Juhel v. Rhinelander*, 2 *Johns. Cases*, 120, and affirmed on error, *Ibid.*, 487.

16. Into what three classes have illicit voyages been divided ?

1. Those where the sovereign of the country to which the ship belonged, has interdicted trade with a foreign country or port: and in that case, the voyage for the purpose of trade would be illicit, and all insurances thereon void.

2. Where the trade in question is prohibited by the trade laws of a foreign state; and in that case, the voyage in such a trade, may be the subject of insurance in any state in which the trade is not prohibited, for the municipal laws in one jurisdiction have no force in another.

3. When neutrals transport to belligerents, goods contraband of war. The law of nations does not go to the extent of rendering the neutral shipper of goods contraband of war, an offender against his own sovereign.—*Parsons, Ch. J.*, 6 *Mass. Rep.* 114, 115. In New-York, the underwriter is presumed to assume the risk of contraband of war, without a previous disclosure of the nature of the cargo; and on the ground of that presumption, the contraband cargo need not be disclosed.—*Seton v. Low*, 1 *Johns. Cases*. 1 *Juhel v. Rhinelander*, 2 *Ibid.*, 120, 487.

OF INSURABLE INTERESTS.

1. What is the general rule as to insurable interests ?

That the assured must have a lawful interest, subsisting at the time of the loss, in the subject insured, to entitle him to recover upon his policy. That interest may be absolute or contingent, legal or equitable. It may exist in him, not only as absolute owner, but also in the character of mortgagor or mortgagee, borrower or lender, consignee, factor, or agent, and may arise from profits, freight, or commission, or other lawful business.

The proper subject of insurance, is lawful property engaged in a lawful trade. We have seen that the property of enemies, and a trade carried on with enemies, do not come within this definition.—*Kent Comm.* 262.

The term *interest* as used in application to the right to insure, does not necessarily imply *property* in the subject of insurance.—*Buck & Hedrick v. The Ches. Insur. Co.*, 1 *Peters' S. C. Rep.* 162.

In the case of *Crawford et al. v. Hunter*, 8 *D. & E.* 13, the plaintiffs were commissioners appointed by the crown, under an act of parliament, to superintend the transportation, &c., of Dutch vessels seized in time of peace, without any present designation for whom—whether to be held in trust, for the original owners, the crown or the captor. The vessel had been carried into St. Helena, and the policy was effected with a view to her safe transportation from that island to England; and after much consideration, it was adjudged that this was a good insurable interest, and the plaintiffs recovered.

The same point was afterwards decided in *Lucena v. Crawford et al.*, 3 *Boss. & Pull.* 75, on a writ of error, to the exchequer, after three arguments, and great deliberation. Yet the seizures were made before declaration of war; and the interest of the plaintiffs amounted to nothing but a power over the subject, with a claim by *quantum meruit*, for their services.

The charterer of a ship has no interest in the freight, as such, and cannot therefore insure it *eo nomine*.—*Robbins v. N. Y. Ins. Company*, 1 *Hall*, 325. Nor can he show by parol, that he intended to insure the profits on his charter party.—*Miller v. National Ins. Co.*, 1 *Ibid.*, 452.

One tenant in common of a vessel has no right, as such, merely, to cause insurance to be made on property on board for his co-tenant.—*Foster v. U. S. Ins. Co.*, 11 *Pick.* 85. Nor a master, as such, merely, to procure insurance for his owners.—*Ibid.*

2. What is the rule as to mere equitable interest ?

That a mere equitable title, or any qualified property in the thing insured may be legally protected by insurance, as in *Strong v. The Manufacturers' Ins. Co.*, 11 *Pick. Mass. Rep.* 40. The plaintiff obtained from the defendants, a policy of insurance upon his house. He had previously mortgaged it for nearly as much as it was worth, and the equity of redemption had been taken and sold upon judgment obtained against him. It was held by the court that he still had an insurable interest.

In the case of *The Columbian Insurance Co. v. Lawrence*, 2 *Peters' S. C. Rep.* 46. Ch. J. Marshall observed, in delivering the opinion of the court, that an equitable interest may be insured, and we can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss in contemplation of law, is his. If the purchase money be paid, it is his in fact. If he owes the purchase money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent his loss. We perceive no reason why he should not be permitted to insure against it. The cases cited in argument, and those summed up in *Phillips on Insurance*, 26, on insurable interest, and in 1 *Marshall*, 104, *ch. 4*, and 2 *Marshall*, 787, *ch. 11*, prove, we think, that any actual interest, legal or equitable, is insurable.

One who charters a vessel, and contracts with the owner to make insurance, has a sufficient insurable interest, and it is not necessary to state the nature of his interest.—*Bartlett v. Walker, Id.*, 267. So one who has an equitable interest in property, the legal title of which is in another, may make insurance upon the property generally, without representing the exact state of his interest in the subject, provided there is no designed concealment of the nature of the interest.—*Locke v. N. A. Insurance Co.*, 13 *Mass. Rep.* 61. *The Columbian Insurance Co. v. Lawrence*, 2 *Peters' S. C. Rep.* 46. An interest under an executory contract, where the contract subsists, is an insurable interest.—*Id.*

A vessel was valued at two thousand dollars, and was insured for that sum, on the 1st of June, to A, or whom it might concern. She was then owned by B, the plaintiff, who on the 1st of July made a bill of sale for her to C, taking a written memorandum, wherein C promised to appropriate the proceeds of the vessel to himself, as security for endorsing for the plaintiff, and to pay over the balance, if any, to D. On the 19th of July, further security was given to C and the memorandum was then exchanged for an instrument under seal, made for the same purposes, wherein C covenanted that the proceeds of all the property assigned to him, including the vessel, should be applied as before mentioned. Afterwards, a loss happened. Held, that notwithstanding the transfer to C there was at the time of the loss, a subsisting interest in the plaintiff which was protected by the policy.—*Gordon v. Mass. F. & M. Insurance Co.*, 2 *Pick.* 249.

The owner of the cargo, without request from the owner of the vessel, repaired her on the voyage, and effected an insurance in his own name on his expenditures for repairs. Held that he had not an insurable interest; that the repairs being voluntarily bestowed, belonged to the vessel, and the property of them vested in the owner.—*Buchanan v. Ocean Insurance Co.*, 6 *Cowen*, 318.

3. Has a person who hires a vessel for a specified term, an insurable interest in her?

He has; for by virtue of the contract, he has, immediately upon its execution, a special property in the vessel, which was at his risk during the term.—*Oliver v. Green*, 3 *Mass. Rep.* 133.

4. Has a person who pays for repairing a vessel, by force of that fact, any insurable interest in her?

He has not. The repairs become a part of the vessel, and having no lien for the money expended, he has no insurable interest.—*Buchanan v. The Ocean Ins. Co.*, 6 *Cow. N. Y. Rep.* 318.

5. What is the rule as to the right of several persons who have an interest in one subject of property, to effect distinct policies of insurance upon it?

That several persons, having several interests in property, may insure to the full value of that interest. There are numerous cases settling this point.—*Locke v. North American Ins. Co.*, 13 *Mass. Rep.* 61. *Fosdick v. Norwich Ins. Co.*, 3 *Day's Conn. Rep.* 108.

6. What is the general rule as to the insurance of freight?

That freight is a lawful distinct subject of insurance.—*Lucena v. Crawford*, 3 *Boss. & Pull.* 75.

7. What is usually undertaken by the insurer in a policy on freight?

That he will pay it, if the ship, by any of the perils enumerated in the policy, shall be prevented from carrying the goods to the destined port.

When that event happens, the question in every case is, whether the loss is total or partial. If the ship should have carried the goods to a port within one day's sail of the port of destination, but should be disabled, by the perils in the policy, from completing her voyage, the assured would be entitled to recover for the loss. In such case, if the assured should have received ninety per cent. for conveying the goods so far as the port where the ship was obliged to stop, it would be evident that he had a right only to recover for a partial and not for a total loss. The assured, in that case, would have a just claim to recover only for the value of the freight from the port where the ship stopped, to the port of delivery. If, however, the owner had procured insurance upon his ship, he might in such case abandon his interest in the ship, and recover for a total loss.—*Coolidge et al. v. Gloucester Marine Ins. Co.*, 15 *Mass. Rep.* 341.

8. May freight in expectancy be a subject of insurance?

It may.—*Cole v. The Louisiana Ins. Co.*, 14 *Martin's Lou. Rep.* 167. In which case the court observed: This is an action founded on a policy of insurance on the freight expected to be earned by the ship which was

insured, and for the voyage, she was insured. It is lawful to effect insurance on freight to be earned.

In France and Spain, freight not earned, cannot be insured, and for the same reason that seamen's wages are not insurable.—*Boulay Paty*, tome 3, 482, 483. By leaving the freight to be earned uncovered, the master has stronger inducements to be vigilant in the preservation of the ship and cargo. This is the reason assigned by Cleirac; but Emerigon says, the true ground of the prohibition is, the uncertainty of the existence of any future freight.—*Ord. de la Mar. du fret*, art. 15. *Code de Commerce*, art. 347. *Cleirac sur le quidon*, ch. 15, art. 1. 1 Emerigon, 224. *Ord. of Bilbao*, ch. 22. But freight already earned and due, may be insured, for it has then ceased to be uncertain.—*Pardessus*, *Cours de Droit Com.* tome 3, n. 764, 765. In England and the United States, future, or expected and contingent, and even dead freight, (which accrues where the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast), is held to be insurable interest. It is necessary, however, that the ship should have actually begun to earn freight, in order to entitle the insurer to recover, for, until then, the risk on the freight does not commence. An inchoate right to freight, is an insurable interest. But when the freight arises from the transportation of the goods, it commences when the goods are put on board, and the policy attaches to the extent of the goods on board, or ready to be shipped. *Tange v. Watts*, *Str. Rep.* 1251. *Thompson v. Taylor*, 6 *Term Rep.* 478. *Forbes v. Aspinall*, 13 *East*, *Rep.* 323. *Davidson v. Willasay*, 1 *Maule & Selw.* 313. *Riely v. Hartford Ins. Co.*, 2 *Conn. Rep.* 368. *Livingston v. Columbian Ins. Co.*, 3 *Johns. Rep.* 49. *Davy v. Hallet*, 3 *Caines' Rep.* 17. *In Adams v. Pennsylvania Ins. Co.*, 1 *Rawle*, 97. In the case of a valued policy on freight, there was specie on board belonging to the owner of the ship, and the ship was lost before any cargo was purchased or contracted for, or procured; and it was held, that there was no claim upon the insurer, for there was only a reasonable expectation of profit upon a cargo expected to be procured and shipped.

The contingency of expected freight was too remote.—3 *Kent's Comm.* 270.

9. What is the rule as to the charterer's right to insure freight?

The charterer of a ship has no interest in the freight *as such*, and he cannot, therefore, insure it *eo nomine*. It seems, however, that an advance of freight-money, may be insured under the general name of freight; but to enable the charterer to recover the amount of the underwriter, he must prove the fact of the advance.—*Robins v. The New-York Insurance Company*, 1 *Hall's N. Y. Rep.* 325.

10. May freight be insured for a part of the voyage only?

It may.—*Taylor v. Wilson*, 15 *East*, 329. In which case the court observed: The question is, whether a freight voyage may be insured part of the way. There is no doubt a party may insure his ship and goods

during a part of the voyage ; and we cannot conceive why he may not also insure freight in the same manner.

11. Has the owner of a vessel, who has mortgaged her for her full value, an insurable interest in her ?

He has.—*Higginson v. Dall*, 13 *Mass. Rep.* 96.

12. What is the general rule as to the insurance of profits ?

Profits are, equally with freight, a proper subject of insurance. The right to insure expected or contingent profits is settled in England, and has received repeated and elaborate confirmation.—*Grant v. Parkinson*, cited in *Park on Ins.* 354, 6th ed. *La Cras v. Hughes*, *ibid*, 358. *Crawford v. Hunter*, 8 *Term Rep.* 13. *Barclay v. Cousins*, 5 *East's Rep.* 544. *Hendrickson v. Meyetson*, *ibid*, 549, note. Profits must be insured, quia profits, 3 *Neville v. Manning*, 819. They are likewise in this country held to be as insurable interest.—*Loomis v. Shaw*, 2 *Johns. Cases*, 36. *Tom v. Smith*, 3 *Caines' Rep.* 245. *Abbot v. Sebor*, 3 *Johns. Cases*, 39. *Fosdick v. Norwich Marine Ins. Co.*, 3 *Day's Rep.* 108. 3 *Kent's Commentaries*, 271.

There must be a substantial basis for the hope or expectation of profits, in order to prevent the policy from being considered a wager.

13. What is the rule in France on this point ?

That assurances on profits are unlawful, and contrary to the code, as they were also to the Ordinances of the Marine.

14. Are commissions considered an insurable interest ?

They are, in those countries where insurances on profits are legal.—*Benecke on Indemnity*, 35. Trustees for prize vessels have an insurable interest.—*Crawford v. Hunter*, 8 *T. R.* 13. 3 *B. & P.* 75. Captors have an insurable interest.—*Boehm v. Bell*, 8 *T. R.* 154. *Sterling v. Vaughan*, 11 *East*, 619. And the consignee may insure.—*Wolf v. Horncastle*, 1 *B. & P.* 316. But not where the shipment is made for the account, and at the risk of the consignor.—*Hibbert v. Carter*, 1 *T. R.* 175. And various persons may insure their several interests, and each to the whole value.—*Godin v. London Assurance Co.*, 1 *Bur.* 489.

15. What is the general rule of commercial law as to the insurance of seamen's wages ?

The commercial ordinances have generally prohibited the insurance of seamen's wages, and the expediency of the prohibition arises from the consideration, that if the title to wages did not depend upon the earning of freight by the performance of the voyage, seamen would want one great stimulus to exertion in times of difficulty and disaster. Though there be no statute ordinance on the subject in the English law, yet it is everywhere assumed as a settled principle in the marine law of England, that seamen's wages are not insurable.—1 *Magens on Insurance*, 18. *Lord*

Mansfield, in 3 *Bur. Rep.* 1912. *Webster v. De Laſtet*, 7 *Term Rep.* 157. *Lord Stowell*, in 1 *Hagg. Adm. Rep.* 239. 2 *New Rep.* 294, S. C. 2 *Boss. & Pull.* 119. And a perquisite, in the nature of wages, receivable by a mariner at the termination of the voyage, is in the same situation as his ordinary wages.

From the nature of the rule, it is evident that it applies only to contingent, and not to vested interests, and therefore a seaman is allowed to insure goods purchased with wages that he has received.—1 *Magens*, 19.

16. Does this rule extend to masters of vessels ?

It does not ; and an insurance on the commission, privileges, &c., of the captain of a ship in the African trade, has been held legal.—*King v. Glover*, 2 *New Rep.* 206.

17. What is wager policy ?

A policy upon a mere hope or expectation, without some interest in the subject matter, is wager policy. And all such policies are, by statute, in England, declared void.

18. What was the rule of the common law upon the subject of wager policies ?

That wager policies were not illegal.—*Crawford v. Hunter*, 8 *Term Rep.* 13. *Good v. Elliott*, 3 *Term Rep.* 693. *Egerton v. Fierzemen*, 1 *Carr. & Payne*, 613.

19. What will amount to a sufficient interest to take a policy out of the statute ?

If a person be directly liable to loss in the happening of any particular event, as if he be an insurer, or be answerable as owner for the negligence of the master, he has an insurable interest.—*Walker v. Maitland*, 5 *Barnw. & Ald.* 171. *Wells v. Philadelphia Ins. Co.*, 9 *Serg. Rawle*, 103. *Lucena v. Crawford*, 3 *Boss. & Pull.* 75. 5 *Ibid*, 269.

The statute 19 Geo. 2, c. 37, does not require the existence of any actual property, but only of an interest in the thing insured, to render the insurance valid.—*Crawford v. Hunter*, 8 *T. R.* 15. *Lucena v. Crawford*, in error, in *Exchequer*, 4 *Boss. & Pull.* 75. Judgment affirmed, *Chambre, J.*, diss. S. C. in error, in *House of Lords*, 2 *New Rep.* 269. 1 *Taunt.* 524. 11 *East*, 629.

20. What is the rule in the United States as to wager policies ?

In New York, the courts had formerly assumed it to be a clear and settled principle of the common law, that a policy in which the insured had no interest, and which was, in fact, nothing more than a wager or bet between the parties to the contract, whether such a voyage would be performed, or such a ship arrive safe, was a valid contract.—*Juhel v. Church*, 2 *Johns. Cas.* 333. *Abbot v. Sebor*, 3 *ibid*, 39. *Clendenning v. Church*,

3 *Caines' Rep.* 141. *Buchanan v. Ocean Ins. Co.*, 6 *Cowen's R.* 318. It was only required that the wager should concern an innocent transaction, and not be contrary to good morals or sound policy.—*Bunn v. Riker*, 4 *Johns. Rep.* 426. *Mount & Wardell v. Waites*, 7 *Ibid.* 434. *Campbell v. Richardson*, 10 *Ibid.* 406.

But now, by *New York Rev. Statutes*, vol. 1, p. 662, § 8, 9, 10, all wagers, bets, or stakes, made to depend upon any lot, chance, casualty, or unknown or contingent event, whatever, are declared to be unlawful, with the exception of contracts on bottomry or respondentia, and all insurances made in good faith, for the security or indemnity of the party insured. The statute has effectually destroyed wager policies, for they are not within the exception.

In Massachusetts, the supreme court expressed a strong opinion against the validity of a wager policy; and the doctrine there is, that all gaming is unlawful, according to the general policy and laws of the commonwealth. In Pennsylvania every specie of gambling policy is reprobated, and they follow the principles, while they do not acknowledge the authority of the English statute in the reign of Geo. II.—*Amory v. Gilman*, 2 *Mass. Rep.* 1. *Babcock v. Thompson*, 3 *Pick. Rep.* 446. *Pritchett v. Ins. Co. of N. Am.*, 3 *Yeates' R.* 464. *Craig v. Murgatroyd*, 4 *Ibid.* 168. *Adams v. Pennsylvania Ins. Co.*, 1 *Rawle*, 107. In Vermont it is held, that no suit will lie to recover property won of another by a bet or wager.—*Collamer v. Day*, 2 *Vermont Rep.* 144.

21. What is the general rule of the commercial law as to wager policies?

Wager policies, without any real interest to support them, are condemned also by positive ordinances in France, and in most of the commercial nations of Europe.—*Ord. de le Mar.*, liv. 3, tit. 6. *Des Ass.*, art. 22. 1 *Emerigon*, 264.

In Scotland, the rule of the civil law relative to *Sponsiones ludicra* was early adopted as common law, and no wager or gaming contract will support an action.—1 *Bell's Com.* 300. *Code de Commerce*, art. 357. *Ord. of Genoa, of Middleburgh, of Rotterdam, of Amsterdam, of Hamburgh, and Stockholm*; collected in 2 *Magens*, 65, 68, 88, 132, 229, 257. *Roccus de Assecut.*, n. 88. The latter refers to a decision of the *Roteo of Genoa*, in which the principle is declared, *Si non adest risicum, assicuratio non valet; nam non adest materia in qua forma possit fundari.*—*Decisiones Rotæ, Genoæ*, 55, n. 9.

22. What is the rule of commercial law, as to validity of a policy upon smuggling voyages?

That an insurance upon a smuggling voyage, prohibited only by the foreign country where the ship has traded or intends to trade, is good and valid provided the insurer was duly informed, when he entered into the contract, of the nature of the trade.—1 *Emerigon*, 210, 215. 2 *Valin*, 128, n. *Emerigon, Com. de Assur.*, tome 2, 127. *Planche v. Fletcher*, *Doug. R.* 238. *Lever v. Fletcher*, cited, *Park on Insurance*, 313, 6th ed.

Roccus Ass., n. 21, says that such an insurance is not binding *ignorante assecuratore*; and *Santerna de assecurat.*, part 4, n. 17. Pothier denies this doctrine, and says that it is not permitted to Frenchmen to carry on, in a foreign country, a contraband trade, prohibited by the laws of the foreign country. They who engage in foreign commerce are bound, by the law of nature and nations, to act in obedience to the laws of the country in which they transact business.—*Traité des Ass.*, n. 58.

An insurance on a voyage undertaken in violation of a blockade, or of an embargo, or of the provisions of a treaty, is illegal, whether the policy be on the ship, freight, or goods, embarked in the illegal traffic.—*The Hurtig Hane*, 3 Rob. Adm. Rep. 324. *Delmeda v. Motteux*, K. B., 25 Geo. 3d. *Park on Insurance*, 311. *Sir William Scott, in the Enroom*, 2 Rob. Adm. Rep. 6. *Hughes on the Law of Insurance*, 70.

VALUATION.

1. What is understood by an open policy of insurance?

An open policy is one in which the amount of interest is not fixed by the policy, but is left to be ascertained by the insured, in case a loss should happen. If a policy on profits be an open one, there must be proof given of the amount of the profits that would probably have been made, if the loss had not happened.—*Mumford v. Hallet*, 1 Johns. Rep. 433.

2. What is understood by a valued policy?

A valued policy is, where a value had been set on the ship or goods insured, and inserted in the policy in the nature of liquidated damages.

3. What are the general rules for assessing the value?

The value in the policy is, or ought to be, the real value of the ship, or the prime cost of the goods, including the incidental expenses of them previous to the shipment, and the premium of insurance.—*Pothier des Ass.*, n. 43.

The manner of estimating the value of insurable interest is fully illustrated, by practical examples, by Mr. Benecke, in his work on Indemnity, Chapter Valuation, and also by Mr. Stevens, in his work on Average, Chapter Valuation; an example (where interest on the premium is calculated) is here given from Mr. Phillips' edition of Stevens and Benecke on Average. With his illustration, Mr. Benecke commences: "When the premium is high and the adventure of long duration, or the premium is paid or drawn for immediately, as is sometimes the case, it will not be superfluous to take also the interest on the premium into the calculation.

"To comprise all the different cases in one, and to show the necessity of an exact calculation, let us suppose £10,000 to be vested in a mercantile adventure, the probable duration of which is 18 months; let the insurance be effected at a place where the underwriters deduct two per cent., and that premium be paid immediately; and let the commission,

brokerage, &c., for effecting the insurance be one per cent., the charges of recovery a half per cent., and the annual interest five per cent. If for capital and simple premium £12,000 be insured, the merchant will recover, in case of a total loss,

£12,000	
Less two per cent.,	240

11,760

Less two and a half per cent.,	294
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£11,466

But he really laid out the capital of	£10,000	0	0
Premium on £12,000 at twenty per cent.,	2,400	0	0
Commission at one per cent.,	120	0	0

12,520 0 0

Interest for the first year, at five per cent.,	626	0	0
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13,146 0 0

Interest for the ensuing six months,	328	13	0
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13,474 13 0

From which deducting the above,	11,466	0	0
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2,008 13 0

If, on the contrary, he insures	£14,753	10	2
He will recover after a deduction of two per cent.,	295	1	4

14,458 8 10

And of two and a half per cent.,	361	9	4
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£14,096 19 6

This is a full indemnification; for he actually paid the capital,	£10,000	0	0
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One per cent. commission and brokerage on			
£14,753 10 2,	147	10	8

Twenty per cent. premium on the same sum,	2,950	14	0
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13,098 4 8

Interest for the first year at five per cent.,	654	18	4
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13,753 3 0

Interest for the following six months,	343	16	6
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£14,096 19 6

"To say, that by insuring so large a sum, the expenses will be too much increased, will be false reasoning.

"A speculation which cannot bear the whole premium, should not be made at all. Interest and premium are to be paid as well as the capital itself, and ought, for that reason, to be protected by insurance. A well informed merchant, therefore, will add the premium for the same to the price of his merchandise, even if he does not pay interest, in the same manner as he adds premium to the capital, when he runs the risk himself. —*Stev. & Ben. on Av., by Phil., 21.*

4. What is the rule for estimating sums to be insured for freight and expenses?

As freight and expenses at the port of delivery, are payable after arrival, the premium only is to be added to their amount, in the same manner as has been shown with respect to goods, and when deduction, charges of recovery, &c., are to be paid, the calculation will be altered accordingly.

Profit expected, is to be insured without premium, because the premium must be defrayed out of the profit itself, whether the goods arrive or be lost. If £1,000 profit be expected, and £100 premium paid to secure it, the profit is reduced to £900. This sum is cleared if the goods on their arrival yield a profit of £1,000. If the premium were included in the insurance, the assured would, in case of a total loss, have a net profit of £1,000 instead of £900, and would consequently gain £100 by the misfortune. This same remark evidently applies to commission.—*Ibid, 21.*

5. What is the rule for valuation of goods from remote countries with which there is no rate of exchange?

That in valuing goods expected as returns from remote countries, where no regular course of exchange with European places exists, that sum is to be looked upon as the prime cost of the goods, which the proprietor would, after deducting all charges, have received, if coin or bullion instead of goods had been remitted. For as those charges cannot be avoided, if the money be sent to Europe, they necessarily enter into a calculation by which the value of foreign money is to be reduced to European; this will more fully appear by example.

Magens says, that, at the time when he lived in Cadiz, the duty, freight, and charges upon dollars from Vera Cruz to Cadiz amounted to 14 1-5 per cent.

Consequently,	\$1,000
Less 14 1-5 per cent.,	142

858

Which sum being insured at 6 per cent., 51½

Net proceeds at Cadiz will be 806½

The same sum ought to be considered as the prime cost of goods bought at that time at Vera Cruz for \$1,000, to which the duty, shipping charges, &c., are to be added. Supposing these charges to amount to

\$631, and the insurance to be effected at 10 per cent, subject to no deduction, the value to be insured is \$996. A policy for this sum covers exactly the prime cost, as the assured, in case of a total loss, would receive the same sum which he would have received, if \$1,000 had been shipped and arrived safe. If larger proceeds at the port of delivery are to be expected, it will be better to insure the surplus as expected profit, than to add it to the prime cost of the goods.—*Stev. & Ben. on Av. by Phil.*, 22.

6. What is the rule for estimating the value of goods obtained by barter?

By adding to the original cost of the goods given in exchange, the charges incurred upon them, and the premium of the voyage homeward.—*Ord. de la Marine, tit. Ass., art. 65. Code de Commerce, art. 340.*

7. What if the capital has increased by barter and profit?

The proprietors ought to be allowed to insure the increase of value occasioned by profit. Valin says, (*Comment. sur l' Ord. tit. Ass., art. 15.*) if the proprietor of a cargo bound for the coast of Guinea, and from thence to St. Domingo, be informed, early enough, of the transactions on the coast of Guinea, to be able to estimate the profit arising from the same, nothing can prevent his insuring the augmentation of the first value of the cargo as a new capital.

8. What is the rule where charges are incurred on an outward voyage, on account of the homeward bound cargo?

They ought to be considered as a part of the prime cost of the latter, but as the homeward bound cargo may possibly be of less value than was expected, in which case it would be over insured, if all the charges of the outward bound voyage were added, the safest way will be to insure for every £100 of the prime cost of the goods that really are shipped, so many pounds more, as those charges are in proportion to the whole expected cargo.—*Stev. & Ben. on Av., by Phil.*, 25.

9. What is the rule of valuing goods shipped to a port, there to be re-shipped to the port of ultimate destination?

The general rule is, to make two valuations; first, the prime cost and charges to the port of re-shipment; there, by a distinct valuation, include the cost of re-shipment to the port of discharge. The blockade of the Elbe frequently gave rise to insurances of this kind, when goods were sent to *Tonning*, and from thence to *Hamburgh* in other ships. In case of insurance to successive ports, of discharge and loading, in an open policy, the amount of interest is to be computed at the commencement of each successive risk. Insurance to the amount of \$12,000 being made on a cargo worth \$16,000, from Alexandria to St. Thomas and two other ports, by a sale of a part of the cargo at St. Thomas, the value at risk was reduced to \$12,000, and subsequently a total loss occurred at Cape Haytien. It was held, that the underwriters were liable for the whole amount underwritten, and not merely for twelve-sixteenths of it.—*Col. Ins. Co. v. Cat.*

lett. 12 *Wheat*, 383. 2 *Phil. Ins.*, c. 14, § 2, No. 7. *Stev. & Ben. on Av.*, by *Phil.* 26.

10. What is the rule for valuing goods where a return of part of the premium is contemplated?

The rule is to include the entire premium, as otherwise the assured would not be fully protected. Suppose the invoice amount of goods to be £1,000, the premium £20 per cent., and £10 per cent. to be returned; the assured will not be fully indemnified in case of a total loss, unless he insure £1,250. But then if the goods arrive deteriorated, the premium must not be returned on that amount which the underwriter pays on account of the damage, because it is already contained in that amount, and he would otherwise pay it twice.—*Stev. & Ben. on Av. by Phil.* 27.

11. What is the rule for estimating the value of a ship?

In the insurance of the ship and of the gross freight no premium is to be included; but when the net freight is insured, the premiums ought to be comprised in the insurance of the ship.

It has been held by the English courts of law, that the value of a ship shall be considered, as to the underwriter, as remaining the same during the whole voyage, notwithstanding the wear and tear, and the consumption of provisions.—*Shaw v. Felton*, 2 *East*, 100, and 13 *East*, 328. *Stev. & Ben. on Av. by Phil.* 30. Money expended during the voyage for repairing the ship, &c., is to be insured with the premiums, and with charges for effecting the policy, (if incurred), and charges of recovery; for the premiums, &c., constitute a part of the charges of the repair, which, after the ship's safe arrival, are to be borne by the party concerned, and in case of her total loss to be paid by the underwriter.—*Stev. & Ben. on Av. by Phil.* 30.

12. What is the rule for determining the interest in open policies?

When goods are insured without a valuation being made in the policy, the invoice price forms the basis for calculating the interest of the assured, to which, in almost every country, shipping charges and premium are added. But no regard is had to any of the adventitious circumstances before mentioned, which may have increased or decreased the value of the article; nor is the interest of the capital admitted into the calculation. By the law and practice of England, the invoice price at the place of shipping, including premiums of insurance, and commissions (if incurred), is for all purposes, of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining the value in the case of an open policy.—*Usher v. Noble*, 12 *East*, 646. *Parkhurst*, 7 *ed.* p. 166.

The rule is the same in the United States. So in *Hamburgh* and *Holland*.—*Ordinance of Hamburgh*, tit. 21, art. 14.

13. What if the goods have risen in value, since they were purchased?

The assured, Emerigon says, is at liberty to make a new invoice, according to the current price.—*Emer. D'Ass.*, chap. 9, sec. 4. According to Emerigon's opinion, the premium is not tacitly understood to be a part of the invoice amount, and therefore would not be added to the calculation of the value of goods insured in open policies.—*Ibid.*, chap. 9, sec. 6.

In Italy, also, the value of goods in open policies, is calculated, in case of total loss, according to the prime cost for current price, at the time and place of loading. But in case of partial loss, a distinction is made as to the place where the misfortune happens.

If the loss occurred before half the voyage was performed, the price at the place of shipping is considered as the value of the goods; if after that period, the price of the goods at the port of delivery, is the standard of the claim of the assured.

By the practice of the Italian courts of judicature, the prime costs and shipping charges only, are considered as forming the value in open policies. Premiums, commissions, &c., are not admitted unless particularly specified.—*Baldass. t. 1, p. 4. Tit. 2, t. 4, p. 356. Decis. 5; Jannan, Stat., L. 4, chap. 17.*

14. What is the rule for calculating interest, where a return of premium is demanded, by reason of short interest?

It must be calculated in the same manner as, according to the usage of the place of the contract, it would be in the event of a loss. In England, therefore, premium and commission (if incurred) must be included, and the premium for the surplus returned.—*Stev. & Ben. on Av., by Phil.*, 35.

15. What is the effect of valuation in policies?

The only effect of the valuation is, that it fixes the amount of the interest, just as if the parties were to admit it at the trial. But in every argument, and for every purpose, it must be taken that the value was fixed in such a manner, as that the insured meant only to have an indemnity.—*Marshall*, 1, 294.

The object of valuation in a policy, is to fix by agreement between the parties, an estimate, upon the subject insured, and to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of the value. In fixing that sum, if the assured keep fairly within the principle of insurances, which is merely to obtain an indemnity, he will never go beyond the first cost, in the case of the goods; adding thereto, only the premium and commission, and if he thinks fit, the probable profit; and in cases of freight, he will not go beyond the amount of what the ship would earn, with the premiums and commissions thereupon.—*Forbes v. Aspinall*, 13 East, 326. *Stev. & Ben. on Av., by Phil.*, 39. The valuation, however, in the case of goods, looks to all the goods intended to be loaded; and in the case of freight it looks to freight upon all the goods the ship is intended to carry upon the voyage insured, and if by the perils insured against in a valuable policy on goods, part only of the

goods intended to be covered, be lost, the valuation must be opened, and the assured can only recover in respect to *that part*.—2 *Phil. Ins. c. 14, S. 1, No. 4. Forbes v. Aspinall, 13 East, 326, contra Shaw v. Felton, 2 East, 109.*

16. What is the rule where there are different valuations in successive policies?

That the insured may resort to the successive policies, if the amount subscribed in the first be not a full indemnity; as where a ship was valued at £8,000, in one policy, on which £6,000 were insured, and in another policy at £6,000 on which only £600 were subscribed. Lord Ellenborough was of opinion, that it was no defence on the second policy, to prove that the assured had received the whole amount of the valuation in *this policy* from the underwriters on the first, if the subject matter to be insured proved to be of a value equal to the sum received, and that sought to be recovered. The assured, in this case, could not have produced the first policy, after a safe arrival, to claim a return of premium on the latter. The rule is the same in the United States.—*Dall v. Higginson, 13 Mass. Rep. 102. Minturn v. Col. Ins. Co., 10 Johns. Rep., 75. Kane v. Com. Ins. Co., 8 Johns. 176. Pleasants v. Mar. Ins. Co., 8 Cr. 55, all cited, 1 Phil. Ins. Co. 308, 309.*

17. What is the rule as to open valuations in France?

The valuation of the policy is considered as the basis of the claim of the assured, unless the underwriter prove it false. The *Guidon de la mer*, however, allows the underwriter to correct the valuation. Valin, Pothier, and Emerigon, are of the opinion that the underwriter is at liberty to insist upon a new valuation, if he be able to prove that contained in the policy to have been too high.—*Le Guidon, ch. 2, art. 12. Valin, art. 64. Pothier, No. 151—159. Emerigon, t. 1, p. 271.*

By the 8th article of the French *Ordonnance* the underwriter has a right to insist upon a new valuation in cases of fraud. The *Code de Commerce* is still more explicit on this point. The 336th art. says, “if there be fraud in the valuation of the subject insured, or if insurance be applied to a subject not meant to be converted by it, (*en cas de supposition*), and also in case of falsification, the underwriter may demand proof, and a new estimate, without prejudice to any other civil or criminal proceedings.”

The Swedish ordinance directs ships not to be insured above their real value, charges and premium included, and that value to be expressed in the policy. The valuation once fixed remains unalterable. If goods are to be valued, an exact specification as to number and value is required, and no further proof, after a total loss, can be insisted upon.—*Art. 352, § 3.*

By the articles of the Copenhagen Insurance Company, goods are to be valued for their real or current price, together with all charges, with or without the premium; and ships, or shares in ships, in the same manner, without, however, adding such articles as are destined to be consumed during the voyage. According to the 22d article of the ordinance of Amsterdam, no valuation shall be made of goods, the prime cost or real value of which can be proved. In Italy the valuation is binding only if it

corresponds with the real value of the thing insured. The underwriters cannot, however, oblige the assured to show that the valuation agrees with the real value; but it is incumbent on them to prove the contrary.—*Baldasseroni, t. 1, p. 4. Tit. 1, § 16, 19.*

The *Ordenanzas de Bilbao* enact, that the value of a ship shall always be expressed in the policy, to avoid litigation after a loss.—*C. 22. art. 10.* With respect to merchandize, it is only said, that no more than their real value, including duty, charges, and premium, is to be insured, or the policy will be void.—*Art. 7.*

The Prussian law requires that whenever the contracting parties have agreed respecting the value of a subject, that value shall be expressed in the policy.—*Tit. Ass. § 2087.* No one shall be at liberty to insure any article for more than its current value at the place of the contract.

In the United States, a valuation of a ship at \$10,000, proved to be only worth \$3,000, has been held valid and conclusive on the parties, there being no actual fraud in the case.—*Hodgeson v. Marine Ins. Co. of Alex. 5 Cranch, 100.*

REPRESENTATION AND CONCEALMENT.

1. What is understood by the term representation, as it relates to a policy of insurance?

An affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If the expressions are ambiguous, the insurer ought to ask an explanation, and not to substitute his own conjectures for an alleged representation.—*Livingston & Gilchrist v. The Maryland Ins. Co., 7 Cranch, 506. 2 Cond. Rep. 596.*

If the information be stated as mere opinion, or expectation, and perhaps as mere belief, it does not amount to a representation, or affect the policy, provided it was given in good faith; for the underwriter, in such a case, takes the risk upon himself.—*Lord Mansfield, Cowp. Rep. 788. Barker v. Fletcher, Doug. Rep. 305. Hubbard v. Glover, 3 Campb. Rep. 312. Bowden v. Vaughan, 10 East's Rep. 415. Rice v. New Eng. Mar. Ins. Co., 4 Pick. Rep. 439. Allegre v. Md. Ins. Co., 2 Gill & Johns. 136. Col. Ins. Co. v. Lawrence, 2 Peters' S.C. Rep. 49. 3 Kent, 284.*

2. What is the general rule as to what facts are necessary to be disclosed in a representation?

That it is the duty of the insured to communicate every species of intelligence which he possesses, which may affect the mind of the insurer, either as to the point whether he will insure at all, or as to the rate of premium.—*3 Kent's Com. 273. Pothier des Ass. n. 43.*

The contract of insurance is one of mutual good faith; and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not at the time in possession of any fact material to the risk, which he does not disclose; and that no known loss had occur-

red, which by reasonable diligence might have been communicated to him—*McLanaghan v. The Universal Ins. Co.*, 1 *Peters' S. C. Rep.* 185.

3. What is the effect of a representation to the first underwriter ?

It enures for the benefit of any one who may sign it after him; and in such a case, if the representation be false in a material point, the policy will be wholly void.—*Pawson v. Watson*, *Cowp.* 789. *Doug.* 11, note 3, *S. C.* But this rule, which has been said to rest upon precedent rather than on reason, has not been carried further; for a representation made to a second or subsequent underwriter, will not affect the liability of one who may sign the instrument afterwards.—*Brine v. Featherstone*, 4 *Taunt.* 869. *Bell & others v. Casters*, 2 *Camp.* 543. 14 *East*, 374.

4. What is the effect of a misrepresentation ?

A misrepresentation by the insured or his agent, of a material fact, will vitiate a policy, whether the party asserts a fact which he knows to be false, or positively makes an assertion which he does not know to be true.—*McDonald v. Frazer*, *Doug.* 247. 4 *Taunt.* 872, 873, 874. *Johns. v. Phoenix Ins. Co.*, 1 *Wash. C. C. R.* 378. 1 *Cond. Marsh. on Ins.* 469, *W. S. C. C.* *Baudwy v. Union Ins. Co.*, 2 *Wash. C. C. R.* 391. 1 *Cond. Marsh. on Ins.* 473, (c) note, *S. C.* *Cole v. Marine Ins. Co.*, 2 *Cond. Rep. S. C.* 201. *Skin.* 327. *Roberts v. Fonnereau*, *Park*, 285. *McDowell v. Frazer*, *Doug.* 260. *De Costa v. Scaudret*, 2 *P. Wms.* 170. *Hodg. v. Richardson*, 1 *Bl. R.* 463. *Ratcliffe v. Schoolbred*, *Park*, 180. *Willes v. Glover*, 1 *Boss. & Pull. N. R.* 14. *Fitzherbert v. Mather*, 1 *T. R.* 12. *Per Lee, C. J.*, in *Seaman v. Fonnereau*, *Str.* 1183. *Manly v. The United Marine & Fire Ins. Co.*, 9 *Mass. R.* 85. *Rice et al. v. New England Marine Ins. Co.*, 4 *Pick. Mass. Rep.* *Baxter v. New England Marine Ins. Co.*, 3 *Mason's U. S. Rep.* 96. *McLanaghan v. The Universal Ins. Co.*, 1 *Peters' S. C. Rep.* 188. *Carter v. Boehem*, 2 *Burr. R.* 1905. *Pawson v. Watson*, *Cowp. Rep.* 785. *Fitzherbert v. Mather*, 1 *T. R.* 12. *Ratcliffe v. Schoolbred*, *Park on Ins.* 249, 6th edit. *Bridges v. Hunter*, 1 *Maule & Selw.* 15. 3 *Kent's Com.* 282.

5. What will amount to such a misrepresentation as to avoid the policy ?

A misrepresentation, to avoid a policy, must not only be false in fact, but must be material, either in relation to the rate of premium, or in offering a false inducement to the underwriter to take the risk. A mere expression of opinion, as to the premium which would be required in other places, cannot amount to such misrepresentation.—*Clason et al. v. Smith*, 3 *Wash. C. C. Rep.* 156. *Cole v. Marine Ins. Co.*, 2 *Cond. Rep.* 201. *Galbraith v. Gracie*, 1 *Wash. C. C. R.* 198, 219. 1 *Cond. Marsh. on Insurance*, 388, (a.) note, *S. C.* *Livingston & Gilchrist v. Maryland Insurance Company*, 7 *Cranch*, 506. *Columbian Insurance Comp. v. Lawrence*, 2 *Peters' S. C. Rep.* 49. *Hazard's Administrators v. The New England Marine Insurance Co.*, 8 *Peters' S. C. Rep.* 557. *Columbian Ins. Co. of Alexandria v. Lawrence*, 10 *Peters' S. C. Rep.* 516. If the insured, by deception and false pretences, induces parties to take a risk, which, had the truth been known, would have been refused, or would

have been taken on different terms, he is not entitled to recover even a return of premium.—*Schwartz v. United States Insurance Co.*, 3 Wash. C. C. Rep. 170. *Sibbold v. Hill*, 2 Dow. 263. *Reed v. Harvey*, 2 Dow. 97, 107, 108. *Wilson v. Duckett*, 2 Burr. 1361. *Tyler v. Horne, Park*. 329. *Chapman et al. v. Frazer*, *Ibid.* 3 *Kent's Commentaries*, 341. *Tyler v. Hern, Park on Insurance*, 285.

A policy will not be avoided by a misrepresentation, when the fact represented is not material to enable the underwriters to form a just estimate of the risk.—*Cowper*, 786, 788. *Douglass*, 11, 12. 1 *T. R.* 345. *Bize v. Fletcher, Douglass*, 275. Nor when the party making it really believes what is asserted, and does not make his assertion positively, but only as a matter of expectation or belief.—*Barber v. Fletcher, Doug.* 292. 4 *Taunt.* 874. 10 *East*, 415. 3 *Campb.* 313. 16 *East*, 176. *Bize v. Fletcher, Doug.* 275. 1 *Campb.* 401, and note. *Driscoll v. Pasmore*, 1 *Boss & Pull.* 200. And, therefore, where the instructions for the policy which were shown to the underwriter, stated that the ship *Julius Cæsar* mounted twelve guns and twenty men; but the ship which was only preparing for her voyage when the policy was effected, in fact carried only nine carriage guns and six swivels, and sixteen men and eleven boys, a force not precisely answering to the description, but still equal in amount, the policy was held valid.—*Rawson v. Watson, Cowp.* 785. *Doug.* 11. So where the broker represented that the vessel was expected to leave the coast of *Africa* in *November* or *December*, 1777, and the ship had in fact sailed in *May*, in that year; the policy which was effected in *March*, 1778, was held valid.—*Barber v. Fletcher, Doug.* 292.

A representation was made that a ship was seen on a certain day in the Delaware. She got to the place before the day, and was lost two days before. Lord Mansfield held, the insured could not recover. He observed, a representation must be fair and true. It should be true as to all the insured knows; and if he represents facts to the underwriter without knowing the truth, he takes the risk upon himself.—*McDowell v. Frazer, Douglass*, 260.

6. How is the materiality of a misrepresentation to be determined?

The question of materiality must be decided by a jury under the direction of the court.—*Livingstone et al. v. The Maryland Insurance Co.* 6 *Cranch*, 274. *Maryland Insurance Comp. v. Ruden's Admr.* 6 *Cranch*, 338. *Columbian Ins. Co. v. Lawrence*, 2 *Peters' S. C. Rep.* 56.

One of the tests, and certainly a decisive test, whether a misrepresentation or concealment is material to the risk, is to ascertain whether, if the true state of the property or title had been known, it would have enhanced the premium. If it would, then the misrepresentation or concealment is fatal to the policy.—*Columbian Insurance Company v. Lawrence*, 1 *Peters' S. C. Rep.* 516. If the ship do not arrive for some time, it is a question for a jury whether the delay materially varied the risk. Where a policy was effected on the 13th of *August*, in *London*, on a voyage at and from *Heligoland* to the Baltic, and the ship did not even sail from the Thames on the outward voyage to *Heligoland* till the 27th. The question was left for the consideration of the jury, who found that the delay

was not material.—*Hull v. Cooper*, 14 *East*, 479. Where the fact is misrepresented is not material, it will have no effect upon the policy.—*Bize v. Fletcher*, *Douglass*, 275. Where a party believes what he states, and it is made as matter of expectation and belief, and not asserted positively, the policy will not be avoided, although he may be mistaken.—*Barber v. Fletcher*, *Doug.* 305. Insuring a ship by an English name does not amount to a representation that she is an English ship.—*Clapham v. Callaghan*, 3 *Campbell*, 382. But upon a statement by a broker at the time of effecting the policy, that the ship was ready to sail on a particular day, when in fact she had sailed the day before; held, that the policy was vitiated.—*Ellis v. Bratton*, 1 *Park on Insurance*, 292.

7. What is the rule as to concealment?

That any concealment of facts, material to the risks, which the insurer is not bound to know, must be communicated, or the policy must be void.—*Vale v. Phoenix Insurance Company*, 1 *Wash. C. C. Rep.* 283. *Moses v. Delaware Insurance Company*, 1 *Ibid.*, 385. *Columbian Insurance Company v. Lawrence*, 2 *Peters' R.* 25. *Bixby v. The Franklin Insurance Company*, 8 *Pickering's Mass. Rep.* 86. It is incumbent on the assured to disclose all the facts in his possession, material to the risk, which are not contained or implied in the policy itself, but he may innocently be silent as facts which the policy necessarily imports.—*Hubbard et al. v. Coolidge et al.* 2 *Gallis*, 353.

8. What is the rule as to the concealment of papers?

The question must always be whether there be a concealment of papers material to the preservation of the neutral character. It is not every idle, accidental, or every meditated concealment of papers, manifestly unimportant in every view before the prize tribunal, which will dissolve the obligation of the policy. If by the usage and course of trade, it be necessary or allowable to have on board spurious papers, covered with a belligerent character, whatever effects it might have upon the rights of the searching cruiser, the concealment of such papers, which, if disclosed, would completely compromise or destroy the neutral character, will not amount to a breach of the warranty.—*Per Story, J., Livingstone & Gilchrist v. The Maryland Insurance Company*, 7 *Cranch's Rep.* 506. 2 *Cond. Rep.* 590. If a vessel take on board papers which materially enhance the risk, and it be not within the regular usage of the trade insured to take such papers, the non-disclosure of the fact that they would be on board would avoid the policy. A false representation, though no breach of the contract, if material, avoids the policy on the ground of fraud, or because the insurer has been misled by it.

Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If a party knowing that his agent is about to

procure insurance for him, withholds information, for the purpose of misleading the underwriter, it is a fraud, and vitiates the insurance.—*McLanaghan v. The Universal Insurance Company*, 1 *Peters' S. C. Rep.* 185.

If the fact that the owners of the property, insured as neutral, are resident and carrying on trade in a belligerent country, is not disclosed to the underwriters, the concealment is material and avoids the policy.—*Baudwy v. Union Insurance Company*, 2 *Wash. C. C. R.* 391. 1 *Cond. Marsh. on Insurance*, 473, (c) note, *S. C.*

9. By whom is the question of due diligence in giving notice to be determined?

By the jury. The material ingredients of the question of the importance of concluding the time of the vessel's sailing, are mixed up of nautical skill, information and experience; and are in no sense judicially cognizable as matters of law. It seems that the question does not cease to be a question of fact, when the vessel is to sail from a port abroad.—*McLanaghan v. The Universal Insurance Company*, 1 *Peters' S. C. R.* 188. 9 *Johns. Rep.* 32. 4 *Taunt.* 494.

In point of law, a person having ordered or advised insurance upon a risk which has commenced, is bound to communicate his knowledge of the loss by the earliest opportunity, and most expeditious and usual route of mercantile communication; but on omission to send by an extraordinary conveyance, although by possibility it might have arrived before the policy was effected, will not vitiate the policy.—*Ingraham v. South Carolina Ins. Co.*, *Const. Rep.*, *Tread. edit.*, p. 707. Where the court held that a policy is avoided by either *allegatio falsi*, or *suppressio veri*.—*Clanston et al. v. Smith*, 3 *Wash. C. C. Rep.* 156. *Weeks v. Glover*, 1 *T. R.* 14. *Lynch v. Dunford*, 14 *East*, 494. *Some v. Hamilton*, 3 *Taunt.* 37. Nothing, however, need be communicated, but what is material to the risk.

10. What if the insured knows, but does not disclose the time of the vessel sailing?

If the insured knows or has been informed at what time his vessel is to sail, it may be very material to the risk that this fact should be disclosed; and if material, and it be not disclosed, the policy is void.—*Johnson v. Phoenix Ins. Co.*, 1 *Wash. C. C. Rep.* 378. 1 *Cond. Marsh. on Ins.* 469, n. *S. Ca.*

11. What is the rule as to the disclosure of public ordinances, course and nature of the trade, &c.

The rule is, that such public facts need not be disclosed. It is the duty of the underwriter to know the course of the trade which they engage to insure: and it will not lie in their mouths to object that the assured has not disclosed what they themselves knew or ought to have known.—*Galbraith v. Gracie*, 1 *Wash. C. C. Rep.* 198, 219. 1 *Cond. Marsh. on Insurance*, 388, (i) note, *S. C.* The underwriters are presumed to know the usages of foreign ports to which insured vessels

are destined ; also the use of trade, and the political condition of foreign nations. Men who engage in this business are seldom ignorant of the risk they incur ; and it is their interest to make themselves acquainted with the usages of the different ports of their own country, and also those of foreign countries. This knowledge is essentially connected with their ordinary business, and by acting on the presumption that they possess it, no violence or injustice is done to their interests.—*Hazard's Administrators v. The New Eng. Marine Ins. Co.*, 9 *Peters' S. C. Rep.* 557.

The underwriter is bound to know every cause which may occasion natural perils—such as the difficulty of the voyage—the nature of the seasons—the probability of lightning, hurricanes, and earthquakes. He is bound to know every cause which may occasion political perils from the rupture of states ; from war, and the various operations of war. He is bound to know the probability of safety from the continuance and return of peace ; from the imbecility of the enemy, through the weakness of their councils or their finances. If an underwriter insure private ships of war at sea and on shore, from ports to ports, and from places to places, any where, he need not be told the secret enterprises upon which they are destined, because he knows some expedition must be in view ; and from the nature of the contract, he waives the information without being told. If he insures for three years, he needs not to be told any circumstance to show it may be over in two ; or if he insure a voyage with liberty of deviation, he needs not to be told what tends to show there will be no deviation.—3 *Burr.* 1905. 3 *Kent's Com.* 283. *Hughes on Ins.* 352. *Marshall on Ins.* 479. 4 *East*, 596. *McLanaghan v. The Univer. Ins. Co.*, 1 *Peters' S. C. R.* 170. *Flinn v. Tobin*, 1 *Moody & Malkin*, 367. *Durell v. Bederly*, 1 *Holt's N. P. R.* 283. *Lynch v. Dunsford*, 14 *East's Rep.* 494. *Moses v. The Del. Ins. Co.*, *Wharton's Dig.* 310. *Greene v. The Merchants' Ins. Co.*, 10 *Pick. Rep.* 402. *Alsop v. The Com. Ins. Co. reported in 2 Phillips on Ins.* 85.

The insured is not bound to disclose all by-gone calamities, or produce his portfolio of letters ; and he need only disclose the material facts known to him at the date of the last intelligence.—*Freeland v. Glover*, 6 *Esp. N. P. Rep.* 14. 7 *East's Rep.* 457, *S. C.* *Kemble v. Browne*, 1 *Caines' R.* 75. *Vallance v. Dewar*, 1 *Camp. N. P. Rep.* 503. *Planche v. Fletcher*, *Doug. Rep.* 251. *Galbraith v. Gracie*, 1 *Condy's Marshall*, 388. *Note, Delonguemere v. N. Y. Firemen's Ins. Co.*, 10 *Johns. Rep.* 120. *Kingston v. Nibbs*, 1 *Camp. N. P. Rep.* 508. *Valance v. Dewar*, *Ibid.* 503. *Stewart v. Bell*, 5 *Barnw. & Ald.* 238. *Seton v. Low*, 1 *Johns. Cases*, 1.

12. What if insurance be effected upon a ship or goods after intelligence has been received of a loss ?

To procure insurance after such intelligence is an act of fraud which clearly vacates the policy.—1 *Shower*, 324. 1 *Peters' S. C. Rep.* 184. And although the account received may be doubtful, yet if its disclosure be material to a just estimate of the risk, the concealment will vitiate a policy. As where the insured received an account that a ship described

like his had been taken, the concealment of this account was held to be a fraud upon the underwriters.—*De Costa v. Scaudret*, 2 P. Wms. 170.

13. What is the rule as to the necessity of disclosing when a ship sails?

The concealment by the insured, of information respecting the time or manner of the ship's sailing, which is material to the probability of her safety.—In *Fort v. Lee*, 3 Taunt. 381. *Foly v. Maline*, 5 Taunt. 430. 1 Marsh. Rep. 117. The non-communication of the time of the ship's sailing was held immaterial; (in the first place the policy was effected on the 24th of May, at and from London, the ship having sailed on the last day of April, but the broker did not communicate this, though it was known to him, and the policy was held valid), such as, for instance, would show that the ship insured is what is termed a missing ship, or is out of time; that she had encountered bad weather; that another ship which had sailed before her, had arrived first, &c., will vitiate a policy.—1 Esp. Rep. 373, 407. 1 New Rep. 14. 1 M. & S. 15. 2 Stark. Rep. 258. 1 B. & Ald. 672. 7 T. R. 167, &c. *McLanaghan v. The Universal Ins. Co.*, 1 Peters' S. C. Rep. 183. 1 Johns. Rep. 152. 2 Caines' Rep. 224. 2 Johns. Rep. 526. 9 Ibid. 32.

In the case in 1 Peters, cited above, the materiality of the time of sailing was very elaborately discussed, both at the bar and by the court. And Mr. J. Story, in delivering the opinion of the court, laid down the principle as follows: "That the time of sailing is often very material to the risk, cannot be denied; that it always is so, is a proposition that will scarcely be asserted, and certainly has never yet been successfully maintained. How far it is so, must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade, as to the navigation and touching, and staying at a port, the objects of the enterprise, and other circumstances, political as well as otherwise, which may retard or facilitate the general progress of the voyage. It has been said, that there is no case in which the materiality of the time of sailing has been doubted, where the ship was abroad at the time; whether this be so or not, is not important to ascertain, unless it could be universally affirmed (which we think it cannot), that the time of sailing abroad, must always be material to the risk. If not always material, the question whether it be so in the particular case, is to be decided upon its own circumstances. Indeed we cannot perceive how the place of sailing, whether from home or a foreign port, can make any difference in the principle. The time of sailing from a home port may be material to the risk, and if so the concealment would vitiate the policy; but whether material or not, opens the same inquisition into facts as governs in cases of foreign ports. There may be less intricacy in conducting it, or less difficulty in arriving at a proper conclusion; but it is essentially the same process. The material ingredients of all such inquiries are mixed up of nautical skill, information, and experience; and are to be ascertained in part, upon the testimony of maritime persons, and are in no sense cognizable as matters of law. The ultimate fact it

self, which is the test of materiality, that is, whether the risk be increased so as to enhance the premium, is, in many cases, an inquiry dependent upon the judgment of underwriters and others, who are conversant with the subject of insurance."—*Cites*, 3 *Taunt. R.* 381. 5 *Ibid.* 144. *Fillis v. Berton*, *Marsh on Ins.* 467. *Park on Ins.* 292. *McAndrews v. Bell*, 1 *Esp. Rep.* 373. *McDowell v. Praza*, *Doug. Rep.* 247–260. *Shirley v. Wilkinson*, *Ibid.* 236. *Hodgson v. Richardson*, 1 *Bl. Rep.* 289. *Littledale v. Dixon*, 4 *Boss. & Pull.* 151. *Hull v. Cooper*, 14 *East's Rep.* 179. 6 *Cranch*, 338. 12 *Johns. Rep.* 513.

What constitutes due and reasonable diligence in cases of this nature is principally matter of fact for the consideration of a jury. When, indeed, all the facts are given, and the inference deducible therefrom, the question may resolve itself into a mere question of law. But it is, in general, impossible to lay down a fixed rule on the subject, from the almost infinite variety of circumstances which may affect its application; much must depend upon the means of communication, the situation of the parties, the knowledge of the conveyances, the fair exercise of discretion, as to time, mode, and place of conveyance, the course of trade, and the nature of the voyage, and the probable chances of the countermand being effectual. All these are matters of fit inquiry before the jury, and must, from their very nature, apply with very different force to different cases.

A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract, must necessarily be imputed to underwriters, *Lord Mansfield in Pelly v. The Royal Exchange, &c.*, 1 *Burr*, 341. *Buck & Hedrick, v. Chesapeake Ins. Co.*, 1 *Peters' S. C. Rep.* 160.

The accidental concealment of the time of the sailing of a vessel, would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and whether fraudulent or not, is matter of fact for the jury.—*McLanaghan v. The Universal Insurance Co.*, 1 *Peters' S. C. Rep.* 188.

The question of the materiality of the time of the sailing of the ship, to the risk, is a question for the jury, under the direction of the court, as, in other cases, the court may aid the judgment of the jury by an exposition of the nature, bearing, and pressure of the facts, but it has no right to supercede the exercise of that judgment, and to direct an absolute verdict, as upon contested matters of fact, resolving itself into a mere point of law.—*McLanaghan v. The Universal Ins. Co.*, 1 *Peters' S. C. Rep.* 191.

A representation to obtain an insurance, whether it be made in writing or by parol, is collateral to the policy; and as it must always influence the judgment of underwriters, in regard to the risk, it must be substantially correct. It differs from an express warranty, as that always makes a part of the policy, and must be strictly and literally performed.—*Hazard's Admr. v. The New England Ins. Co.*, *Peters' S. C. Rep.* 557.

14. What is the rule as to the suppression of letters?

That the concealment of letters containing facts material to the risk

vitiates the policy. The concealment of a letter stating that the ship had been met with at sea in a leaky state, is material, and vitiates the policy.—1 *Barn. & Alderson*, 672. As where the agent for the insured had received a letter, stating that, “on a certain day at twelve in the night, the ship was lost sight of all at once, that the captain had said she was leaky, and that the next day they had had a hard gale,” the concealment of this letter was held to be material, although the ship continued her voyage for several days, and was lost by hostile capture.—*Lynch et al. v. Hamilton*, 3 *Taunt.* 37. *Lynch v. Dimsford*, in *Error*, 14 *East*, 49. *Weir v. Aberdeen*, 2 *Barn. & Ald.* 320, 325. 3 *Taunt.* 37, 39, 40, 43. *Kewby v. Ryan*, 2 *H. Black.* 343.

15. What is the rule as to the concealment of accidents generally ?

The concealment of an accident by which the ship has sustained probable damage, after the commencement of the risk, and before the time at which the policy is effected, although the safety of the vessel may not be materially involved in the accident, is still regarded as material.

The effect of the concealment of such an occurrence is not indeed to avoid the policy in toto, but to render the damage which the ship received, an implied exception out of the policy, for which the underwriter will not be liable.—*Gladstone et al. v. King*, 1 *M. & S.* 35. The insured were not entitled to a return of premium, as the policy was not void in toto.—*Wier v. Aberdeen*, 2 *Barn. & Ald.* 320. *Hare v. Travis*, 7 *Barr. & Cress.* 14. A dubious cause of damage ought to be communicated. It is not necessary for the insured to state that the ship is foreign built, although it be on that account exempted from the provision of a convoy act in force at the time.—*Long v. Duffe*, 2 *Boss. & Pull.* 20. The jury found that, according to usage, this information need not be disclosed.—*Haywood et al. v. Rodgers*, 4 *East*, 590. 1 *Smith*, 289. *S. C.* 1 *Campbell*, 116. *Schoolbred v. Nutt*, *Park on Ins.* 346. *Marsh. Ins.* 475. *Approved, per Cur.* 4 *East*, 598. The concealment of an attack, which has been already begun, or is threatened by an enemy, and which is peculiarly within the knowledge of the insured, will vitiate a policy. So, in one case, the concealment of a letter written from the Cape of Good Hope, stating that there were two or three French privateers in those seas, was held to avoid a policy.—*Beckwaite v. Nalgrove*, 3 *Taunt.* 41, 42. The nature of this work will not permit the insertion of all the cases relating to concealment; neither is it necessary, since the reader will perceive that they are cases depending wholly on their own special circumstances. If he is desirous of pursuing the subject, he may peruse the following cases.—*Seaman v. Fonnereau*, *Stra.* 1183. *Carter v. Boehm*, 3 *Bur.* 1905. 1 *Bl. R.* 594. *Shirley v. Wilkinson*, 3 *Doug.* 41. *Court v. Martineau*, 3 *Doug.* 161. *Webster v. Foster*, 1 *Esp. N. P. C.* 407. *Willes v. Glover*, 1 *Boss. & Pull. N. R.* 14. *Little del. v. Dixon*, 1 *Boss. & Pull. N. R.* 151. *Freeland v. Glover*, 7 *East*, 457. *Lynch v. Hamilton*, 3 *Taunt.* 37. *Bell v. Bell*, 2 *Campb.* 479. *Kirby v. Smith*, *B. & A.* 672. *Weir v. Aberdeen*, 2 *B. & A.* 320. *Bufe v. Turner*, 6 *Taunt.* 338. 1 *Marsh. Rep.* 46. *S. C. Rickards v. Murdock*, 10 *B. & C.* 527.

Elton v. Larkins, 8 Bingham, 198. *J. M. & Sc.* 323. *Planche et al. v. Fletcher*, Doug. 238. *Atkinson v. Abbott*, 11 East, 135. 1 Campb. 535. *Stewart v. Bell*, 5 B. & Ald. 238. *Kingston v. Nibbs*, 1 Campb. 508. *De Costa & Edmunds*, 4 Campbell, 142. *Nelson v. Louisiana Ins. Co.* 17 Martin's Lou. Rep. 289. *Strong v. The Manufacturers' Ins. Co.* 10 Pick. Mass. Rep. 40. *Curry v. The Commonwealth Ins. Co.*, 10 Pick. 535. *Popleston v. Kitchen*, 3 Wash. U. S. C. C. Rep. 138. *Hodson v. Marine Ins. Co.*, 5 Cranch's U. S. Rep. 100. *Green v. Merchants' Ins. Co.*, 10 Pick. Mass. Rep. 402. *Hodson et al. v. Mississippi Ins. Co.*, 2 Mil. Lou. Rep. 341. *Hodgson v. Marine Ins. Co. of Alexandria*, 5 Cranch's Rep. 100. *Livingston & Gilchrist v. The Maryland Ins. Co.*, 6 Cranch, 274. *Maryland Ins. Co., v. Ruden's Admrs.* 6 Cranch's 338. *Johns. v. The Phoenix Ins. Co.*, 1 Wash. C. C. Rep. 378. *Moses v. The Delaware Ins. Co.*, 1 Wash. C. C. Rep. 385. *Boudwy v. Union Ins. Co.*, 2 Wash. C. C. Rep. 391. *Kleine v. The Lancaster Ins. Co.*, 2 Cond. Rep. 201. *Buck & Hedrick v. Chesapeake Ins. Co.*, 1 Peters' S. C. Rep. 160. *Columbian Ins. Co. v. Lawrence*, 2 Peters' S. C. Rep. 46. *Carrington et al. v. The Merchants' Ins. Co.*, 8 Peters' S. C. Rep. 495. *Hazard's Administrators v. New England Ins. Co.*, 8 Peters' S. C. Rep. 557. *Columbian Ins. Co. v. Lawrence*, 10 Peters' S. C. Rep. 707.

16. What is the general rule as to the concealment of the age and tonnage of a ship in a valued policy?

There is no fixed rule on the subject, nor can there be, as every case of this nature must be governed more or less by special circumstances. In general, concealment of the age of a vessel is not material, for that appertains much to her sea-worthiness; but with regard to the size, the concealment or misrepresentation of tonnage may be material, but that degree of misrepresentation which shall vitiate a policy, is a question of fact.

In the case of *Hodgson v. The Marine Insurance Company of Alexandria*, 5 Cranch, 100, which was an action on a valued policy on a ship valued at ten thousand dollars, and represented to be two hundred and fifty tons burthen, and six or seven years old. The policy underwritten was eight thousand dollars. The ship was shown to be worth not more than half that sum, and the representation of age and tonnage was alleged to be untrue, but the court held the valuation binding upon the insurers, observing as follows: the allegation that the vessel was worth, when insured, only three thousand dollars, is very unimportant, it being nowhere stated that the plaintiff represented her to be worth more, but only proposed that her value in the policy should be agreed at ten thousand dollars. Now, although she might not in fact have been worth this sum, it is impossible for the court to say that this difference was produced entirely by the mistake which was made in her age and tonnage. This would be to say that a difference of a year or two in the age, and of fifty or sixty tons in the burthen of a vessel must, in all cases, have the same effect on her value; a conclusion which, on investigation, would be found very incorrect. Nor,

if it appeared on the trial that her actual worth was no more than three thousand dollars, would it necessarily avoid the contract of, nor restrict the damages to that sum.

WARRANTY.

1. How is a warranty of a policy of insurance regarded in law ?

As a condition precedent; that is, a stipulation upon the strict compliance or non-compliance with which the validity of the policy depends. No substantial compliance with the warranty, or performance of an equivalent act, will avail the insured, or render the underwriters liable, if the express terms of the contract be infringed.—*De Hahn v. Hartley*, 1 Term R. 345, 346. *Goicoechea v. Louisiana State Insurance Co.*, 6 Martin's N. S. 51. 3 Kent's Com. 288.

2. Of what two kinds are warranties ?

Either express or implied. An express warranty must be reduced into writing, and forms a part of the policy itself; an implied warranty is that which results by mere operation of law from the relative character and situation of the insured and underwriter. Thus a warranty inserted in the policy, that the ship is neutral property, is an *express* warranty; a warranty that the ship is seaworthy, is *implied*; that is, annexed to every policy by application of law without any express stipulation.

3. What is the main requisite to constitute a warranty ?

That it form a part of the written policy. To make the broker's instructions, whether in writing or by parol, valid and binding as a warranty, they must be inserted in the policy.—*Parson v. Watson*, Cowp. 788, 790. Though a written paper is wrapped up in the policy, and shown to the underwriters when the contract is brought to them to be subscribed, or though it is wafered to the policy at the time of the subscription, still it is not in either case a warranty, or to be considered as part of the policy itself, but only as a representation.—*Kenyon et al. v. Berthon*, Dougl. 21, n. 4.

4. What warranties most frequently occur in policies of insurance ?

1st. The warranty of neutrality. 2d. Warranty of ship's safety at a certain time. 3d. Warranty to sail at a certain time. 4th. Warranty to sail with convoy. 5th. Warranty of the ship's freedom from confiscation or seizure in port.

5. What is necessary to satisfy a warranty of neutrality ?

It is necessary that the ship should be in fact such as she is represented, that she should be documented as such, and observe the obligations imposed upon by her national character.—3 Kent's Com. 290. *Blagge v. New York Ins. Co.*, 1 Caines' Rep. 549. *Baring v. Royal Exchange Ins. Co.*,

5 *East*, 99. *Carrere v. Union Ins. Co.*, *Condy's Marshall*, 406. *Galbraith v. Gracie*, *Ibid.* *Phoenix Ins. Co. v. Pratt*, 2 *Binney's Rep.* 308. *Wilcox v. Union Ins. Co.*, *Ibid.*, 174. *Coolidge v. N. Y. Firemen's Ins. Co.*, 14 *Johns. Rep.* That she submit to visitation and search.—3 *Kent's Com.* 299. 1 *Kent's Com.* 153. *Vattel*, b. 3, ch. 7, sec. 114. *The Maria*, 2 *Dobson's Ad. R.* 245. *The Marianna*, 11 *Wheat.* 42. *The Maria*, 1 *Rob. Rep.* 287. *The Elsebe*, 4 *Rob.* 488. *The Nereide*, 9 *Cranch*, 427—453. *Thurloe's State Papers*, Vol. II., p. 503. *The Prince Frederick*, 2 *Dodson's Ad. Rep.* 451.

If a ship, or goods warranted neutral property, be not in fact neutral, the insured cannot recover, although the loss may happen from another cause, for the condition annexed to the contract fails.—*Woolmer & Anthony v. Muelman*, 3 *Burrows*, 1419. 1 *Bla. Rep.* 427. *Fitzsimmons v. The United States Ins. Co.*, 4 *Cranch's Rep.* 185. That the vessel should be navigated, not only according to the law of nations, but also in conformity to the particular treaties subsisting between the country to which she belongs and the belligerent states.—*Bird v. Appleton*, 9 *T. R.* 567.—But it is not necessary in order to satisfy a warranty of neutrality, that the vessel should be navigated in conformity to an *ex parte* ordinance made by one of the belligerent states, and to which the neutral state is not a party.—*Maine v. Walter, Park*, 531. *S. C.* 3 *Doug.* 79. *Pollard v. Bell*, 8 *T. R.* 434. *Bird v. Appleton*, 8 *T. R.* 562. *Price v. Bell*, 1 *East*, 663.

6. By what is the character of neutral property determined?

By the domicile of the owner.—*Arnold v. The United Ins. Co.*, 1 *Johns. Cases*, 368. *Johnson v. Ludlow*, 2 *Johns. Cases*, 481. *Livingston v. Maryland Ins. Co.*, 7 *Cranch, Rep.* 542. *The Venus*, 3 *Cranch*, 278. *The Francis*, 8 *Cranch*, 335. *The Mary and Susan*, 1 *Wheat. Rep.* 46. *Abbott v. United Ins. Co.*, 16 *Johns. Rep.* 128. And if he have partners resident in a neutral country, the joint property of the house will not be neutral.—*Arnold v. United Ins. Co.*, 1 *Johns. Cases*, 363. *The Antonia Johanna*, 1 *Wheat. Rep.* 167. *The Friendship*, 4 *Wheat. Rep.* 105. 1 *Kent's Com.* 80. *The Vigilante*, 1 *Robbins. Rep. The Portland*, 3 *Rob. Rep.* 41. *The Indiana*, 2 *Gallison's R.* 268. *The Antonia Johanna*, 1 *Wheaton*, 159.

Insurance of goods on board an American vessel from Norfolk to Cadiz, during the late war between the United States and Great Britain, "warranted free from British and American capture and detention, but the usual sea risks to continue both during capture and after liberation." The vessel having on board a British license, was stopped at the mouth of the Chesapeake, by a British blockading squadron, and ordered back to Norfolk, under pain of capture and condemnation; she accordingly returned up the Chesapeake, and afterwards gave up the voyage. Held, that it was a loss, by the detention of the British, within the meaning of the warranty.—*Wilson v. The United Ins. Co.*, 14 *Johns. Rep.* 227. *Hayward v. Blake*, 12 *Mass. Rep.* 176. *Perkins v. N. E. Marine Ins. Co.*, *Ibid.*, 214. *Bulkly v. Derby Fishing Co.*, 1 *Conn. Rep.* 571.

7. To what time does the warranty of neutrality have relation?

To the time of the commencement of the risk. If the vessel be neutral at the time of sailing, the warranty is satisfied, although a war should break out immediately after her departure.—*Eden v. Parkinson*, Dougl. 705, 722. *Tyson et al. v. Gurney*, 3 Term Rep. 477. Adm., 8 Term Rep. 233.

8. What is the effect of these words in a policy of insurance on goods, "of and in the ship called the *Caroline*, an American vessel?"

It seems to amount to an express warranty that the ship is American.—3 Boss. & Pull. 501, 503, 509. *Per Chambre, J.* 514, 515. *Per Le Blanc, J.* 531, 506. *Baring v. Christie*, 2 East, 398, 404, 405. 3 Camp. 382. 1 Johns. Cas. 341. 2 Ibid, 168.

For the term "warranted" is not necessary, nor any other precise expression. But on the other hand the terms in a policy will not constitute a warranty, unless it sufficiently appear from them that that was the intention of the parties. Thus where a policy described the insurance to be on goods on board the ship called the "*American Ship President*," this was taken to be the name of the ship, and not a warranty of her being an American ship called the *President*.—*Chapham v. Cologon*, 3 Camp. 382.

9. What if the ship do not sail on the precise day warranted?

The policy is at an end. So if a ship be warranted to sail with a certain number of men, and she sail with a less number, the condition of the policy is broken, although the jury find that the number of men with which the ship sailed, rendered her as safe as she would have been with the number specified.—*De Hahn v. Hartley*, 1 T. R. 344.

10. What does a warranty that a ship is of a particular nation, import?

That she is entitled to all the privileges of such national flag.—*Rich v. Parker*, 7 T. R. 705. 1 Dow, 331. 14 East, 394. 1 Stark, 508. *Baring et al. v. Christie*, 5 East, 398. 1 Smith, 462. 2 Boss. & Pull, 208, 212

11. What will satisfy a warranty of safety on a particular day?

The safety of the ship or goods at any time on that day; and although the policy is subscribed on the same day, and a loss has taken place before the subscription, the underwriters will still be liable.—*Blackhurst v. Cockell*, 3 T. R. 360.

A policy from the port of H, with a warranty that she was safe on that day, means that she was safe in the port of H. on that day.—1 M. & S. 81.

12. What is necessary to satisfy the warranty to sail on or before a particular day?

That she should set sail by the appointed time, in a state of preparation and equipment for the voyage. This species of warranty is not complied with by the ship's raising her anchor, getting under sail, and moving onwards, unless those acts are done as the commencement of the voyage, and every thing is then ready for its prosecution.—*Ridsdale et al. v. Newnham*, 3 M. & S. 456. 4 Camp. 111. *Lang. et al. v. Anderson*, 3 B. & C. 495.

Where a ship insured at and from Jamaica to London, and warranted to sail at a certain time, set sail from St. Anne's in Jamaica, before the time, with all her cargo and clearances on board, and proceeded to Bluefields, another port in the same island, for the purpose of joining the convoy which was ready at that place, the warranty was holden to be satisfied, although the ship was detained at Bluefields by an embargo, beyond the time specified in the warranty.—*Bond v. Nutt*, Cowp. 601. Doug. 352, old edit., n. 9, S. C. Recognized in *Thelluson v. Fletcher*, and *Thelluson v. Staples*, *ibid.* *Thelluson v. Fergusson*, Doug. 346. Cowp. 607.

A warranty to sail is complied with, if the ship, being fully equipped for the voyage, break ground, and get under weigh by the appointed time.

13. What is the distinction between a warranty to *sail*, and a warranty to *depart* at a specified time?

A warranty to depart, requires that the vessel shall be completely out of the port from which the voyage is to commence, by the time specified. Therefore, where a ship, being insured at and from Memel, and warranted to depart on or before the 15th of September, obtained her clearance, and set sail on her voyage before that day, but was detained within the harbor, by the contrary winds, till afterwards, the warranty was not complied with.—*Moir v. Royal Exchange Assurance Co.*, 4 Camp. 84. 3 M. & S. 461. in *K. B.* 1 Marsh. Rep. 570. 6 Taunt. 241. C. P. If the ship had been warranted to "sail" on or before the 15th of September, she would have satisfied the warranty by the course adopted; but she had not satisfied the warranty to "depart," which required that she should leave the port of Memel, on or before the day mentioned in the warranty.—*Lang et al. v. Anderson*, 3 B. & C. 495.

14. What is understood by a warranty to sail with convoy?

A warranty to sail or to depart with convoy, is understood to mean that the ship shall sail with the convoy appointed by government for the voyage; the underwriters cannot be supposed to have intended that the insured may select any convoy they think proper, when a regular and public convoy for the voyage had been appointed.—*Cohen v. Hinckley*, 1 Taunt. 249. 2 Hen. Bla. 551. Doug. 72. *Lilly v. Ewer*, Doug. 72, 75.

The insertion of the words "for the voyage," is not necessary, for these words are implied in the general expression "with convoy."

15. What will amount to a sufficient joining of convoy?

It is not absolutely necessary that a ship insured should break

ground at the same time as the convoy, if the master be fairly within the intended protection, and have used due diligence to avail himself of it.—4 *Camp.* 109, 110.

16. What is understood by the word convoy ?

A naval force, under the command of a person appointed by the government of the country to which the vessel insured belongs.

17. By what must a warranty to sail with convoy be construed ?

By the usage of trade, and the orders of government under which convoys are appointed and regulated. And, therefore, a warranty to depart with convoy, in a policy from London to the East Indies, is satisfied by the ship joining convoy in the Downs, that being the usual place of rendezvous.—*Lethulier's case*, 2 *Salk.* 445. 2 *Stra.* 1261, 1266. 4 *Camp.* 62. *Audley v. Duff*, 2 *Boss. & Pull.* 111, 116.

And so, a warranty to depart with convoy, in a policy from London to Gibraltar, has been held to be satisfied by the ship's joining the convoy for the Gibraltar trade off Spithead.—*Gordon v. Moreley*, 2 *Stra.* 1265. *Campbell v. Bordieu*, *id. Ibid.* *Cowp.* 611, 602, 603. 2 *Stra.* 1251. 2 *Boss. & Pull.* 114, 115. *D'Egueno v. Berwicke*, 2 *Hen. Bla.* 554. *Cohen v. Hinckley*, 1 *Taunt.* 249, 254.

18. What is the rule as to sailing orders ?

That the warranty to depart with convoy is not satisfied, unless sailing instructions be obtained before the ship leave the place of rendezvous, if the master can obtain them by the use of due diligence.—*Anderson v. Pitcher et ex.*, 2 *Boss. & Pull.* 164. 3 *Esp.* 124. *Citing Hibbert v. Pigou*, *Park*, 498. *Verdon v. Wilmot*, *Park*, 500, &c. *France v. Kirwin*, *Park*, 502. *Webb v. Thompson*, 1 *Boss. & Pull.* 5. 2 *Stra.* 1250.

19. Why are sailing orders so essential ?

The reason is, that without them the captain cannot answer signals ; he does not know the place of rendezvous in case of a storm ; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited.—1 *Boss. & Pull.* 5. 2 *Id.* 169. *Anderson v. Pitcher et ux.*, 2 *Boss. & Pull.* 134. 3 *Esp.* 124.

A ship warranted to sail or depart with convoy, is obliged to keep with the convoy, and cannot wilfully separate from it after the commencement of the voyage, without a violation of the warranty.—*Jeffreys v. Legendre*, 3 *Leo.* 320. 1 *Show.* 320. 4 *Mod.* 60. *Com. Dig. Merchant*, E. 9, recognized 10 *Mod.* 287, and *Mr. Selwyn's Nisi Prius*, 940, 941. *Audley v. Duff*, 2 *Boss. & Pull.* 114.

20. How is a warranty, free from seizure in ports of discharge, to be construed ?

The construction of a warranty of this description may be considered,

first, with reference to the cause of the loss, and the place where it happened; secondly, with reference to the extent of its operation in discharging the underwriters. When the ship or goods are warranted free from confiscation by the government in the ship's port or ports of discharge, the confiscation referred to by the warranty, must, according to the definition of Lord Ellenborough, be an act done on the part of the government of the country where it takes place; and in some way for the benefit of that government, though the proceeds may not, strictly speaking, be brought into the treasury.—*Lang v. Glover*, 5, *Taunt.* 49.

21. What is the word port, in such a warranty, defined to mean?

In *Seaman v. Cooper*, 2 *Camp.* 613, 13 *Edst.* 394, *S. C.*, the court observed, that the word "port," was used in contradistinction to the high seas.

If a vessel be taken at her moorings, being neither within the *caput portus*, nor within that part of the haven where ships usually unload, the underwriter is not discharged by a warranty against the capture in the ship's port of destination.—*Keyser v. Scott*, 4 *Taunt.* 660.

22. Is the question whether a ship was at her port of discharge, to be determined by the court, or by the jury?

It has been considered to be the province of a jury, to determine whether the place where the seizure was made, was the ship's port of discharge or not. And when the vessel is not in the port, nor even in a place where ships usually discharge their cargo, the jury will be directed to find against the underwriters, exemption, under a clause which frees them from liability, for a seizure in part.—*Keyser v. Scott*, 4 *Taunt.* 661, 662. *Reynor v. Pearson*, 4 *Taunt.* 662. *Leven v. Newnham*, 4 *Taunt.* 722. So the jury will determine according to the nature of the voyage, and the documentary evidence, (such as the policy, charter party, invoice, and bill of lading, &c.,) whether the ship, when she cast anchor at a certain place, had elected that as her port of discharge, or whether the master's intention was suspended, and he merely waited off the place for information. 4 *Taunt.* 722.

23. May the insured recover for a part of damages incurred previously to a loss within this description of warranty?

He cannot. Thus, where an American ship insured from *New-York to London*, and warranted free from American condemnation, having sailed away in the night for the purpose of eluding an embargo, was driven on shore by the force of the ice, wind and tide, and sustained a partial damage, but was seized the next day, and finally condemned by the American government for the breach of an embargo; the Court of King's Bench held, that the insured could not recover for the partial damage which the ship had sustained by the stranding.—*Levie v. Jansan*, 12 *East*, 648. It seems, however, in such a case, that the insured might recover for actual embursements made for the repair of damage by sea

peril, before a total loss.—*O'Riely et al. v. Royal Exchange Assurance Co.*, 4 Camp. 246.

24. What is the effect of deviation under such warranty?

Where this species of warranty is inserted in the policy, the insured cannot deviate from the usual course in order to avoid the expected peril, for that would be to throw the liability upon the underwriters by an indirect course, when they would have been exempted if a direct course had been pursued.—*O'Riely et al. v. Royal Exchange Ass. Co.*, 4 Camp. 246.

IMPLIED WARRANTY.

1. What warranties are implied in every policy of insurance?

Sea-worthiness, proper documentation, and not to deviate.

2. What is understood by warranty of sea-worthiness?

There is in every policy an implied warranty that the ship is seaworthy when the policy attaches. This means, that the vessel is competent to resist the ordinary attacks of wind and weather, and is competently equipped and manned for the voyage, with a sufficient crew, and with a sufficient means to sustain them, and with a captain of general good character and nautical skill.—*Law v. Hollingsworth*, 7 Term Rep. 168. *Wilkee v. Geddes*, 3 Dow's R. 58. *Silva v. Low*, 1 Johns. Cas. 184. *Brown v. Girard*, 4 Yeates' Rep. 115. It is also an implied condition that the goods, tackle of the ship, &c., shall be properly stowed.—*Roccus*, note 22. *Brooks v. Oriental Ins. Co.*, 7 Pick. 259. *Talcott v. The Com. Ins. Co. of N. Y.*, 2 Johns. N. Y. Rep. 124. *Coit et al. v. Del. Ins. Co.*, 2 Wash. U. S. C. C. Rep. 375. The implied warranty is, that the vessel shall be in a navigable state when she sails, and does not extend back to the time she is in port; for the ship while at the place, probably must be undergoing repairs.—*Taylor v. Lowel*, 3 Mass. R. 331. *The Merchants' Ins. Co. v. Clapp*, 11 Pick. Mass. Rep. 56. *Taylor v. Lowel*, 3 Mass. Rep. 331. *Seamen v. Loring*, 1 Mason's U. S. Rep. 140. *McLanaghan v. The Universal Ins. Co.*, 1 Peters' Rep. p. 183. Sea-worthiness in port or lying in the offing may be one thing, and sea-worthiness for a whole voyage quite another, 184. A policy on a ship "at and from a port" will attach, although the ship be at the time undergoing extensive repairs in port, so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy.—*McLanaghan v. The Universal Insurance Co.*, 1 Peters' S. C. R. 184. *Brandagee v. The National Insurance Company*, 20 Johns. N. Y. R. 326. *Bank of Auburn v. Weed*, 19 Johns. Rep. 300. *Steinmetz v. The United States Ins. Co.*, 2 S. & R. Penn. R. 296. *Dorr v. The Pacific Ins. Co.*, 7 Wheat, U. S. Rep. 581. *Jannay v. Columbian Ins. Co.*, 10 Wheat. 411. 2 Campb. 235, 237. 6 Taunt. 46, v 4 Campb. 111, S. M. & S 455, 458. Cowp. 601.

3. What is the effect of a survey and condemnation upon the warranty of sea-worthiness?

If the condemnation be by reason of rottenness, the survey is conclusive upon the question of sea-worthiness, and may be pleaded as a bar to an action on the policy.—*Rogers et al. v. The Niagara Insurance Co.*, 2 *Hall's N. Y. Rep.* 86. *Dorr v. The Pacific Ins. Co.*, 7 *Wheat. U. S. Rep.* 582. *Brandagee v. The National Ins. Co.*, 20 *Johns. N. Y. Rep.* 328. *Griswold v. The National Insur. Com.*, 3 *Cowen's N. Y. Rep.* 96. *Steinmiltz v. The United Ins. Co.*, 2 *Serg. & Rawle's Penn. Rep.* 297. *Garrigues v. Cox*, 1 *Binn. Penn. Rep.* 595. The ship must be provided with sufficient ground tackle for the service in which she is engaged, and therefore, where the best bower anchor and the cable of the small bower anchor were defective, the vessel was held not to be seaworthy.—*Wilkie et al. v. Geddes*, 3 *Dow's R.* 57. 2 *Barn. & Ald.* 324. *Hughes on Ins.* 265. On a long voyage, there should be some person besides the captain, who can take the command if he be ill.—1 *M. & S.* 103.

4. What if the defect be unknown to the owners?

Any defect which may endanger the ship, though unknown to the assured, will discharge the underwriters; for it is the duty of the assured to provide a good ship, in such state and condition as to be able to perform the destined voyage, *i. e.* seaworthy.—*Silva v. Low*, 1 *Johns. Cas.* 184. *Talcott v. Mar. Ins. Co.*, 2 *Johns. Rep.* 130.

It is not necessary to inquire whether the owners acted honestly and fairly in the transaction; for it is clear law, that however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not seaworthy, the underwriter is not liable.

5. How far is it obligatory upon the owner to keep his vessel seaworthy during the voyage?

It is the duty of the insured to keep his vessel seaworthy during the voyage, if it be in his power to do so; and if, from the neglect of the owner or his agents, the vessel becomes unseaworthy, by damage or loss, he must repair the damage, or supply the loss, at the port of refuge, refreshment, or trade, if it can be done.—*Paddock v. Franklin Ins. Co.*, 11 *Pick.* 227. But it is an implied warranty, which relates to the commencement of the risk, and, if broken, discharges the insurer; but if broken after the risk has commenced, it does not discharge from subsequent loss, unless such loss be a consequence of it.—*Am. Ins. Co. v. Ogden*, 15 *Wend.* 532. *Prescott v. Union Ins. Co.*, 1 *Whart.* 399. There is no implied warranty of sea-worthiness, except at the commencement of the voyage. *Peters v. Phoenix Ins. Co.*, 3 *Serg. & Rawle*, 25. When the assured have once provided a sufficient crew, the negligent absence of all the crew, at the time of the loss, is not any breach of the implied warranty that the ship shall be properly manned.—*Hucks v. Thornton*, *Holt's N. P. C.* 20. *C. B. Gibbs, C. J. Busk v. Royal Exchange Assurance Co.*, 2 *Barnw. & Ald.* 73.

6. What if a ship be unseaworthy at the commencement of a voyage, but the defect be subsequently cured, and afterwards a disaster happened?

The subsequent loss is recoverable under the policy. This was so held by Chief Justice Abbott, in *Weir v. Aberdeen*, 2 Barn. & Ald. 320. In the case of *McLanaghan v. Universal Ins. Co.*, 1 Peters' S. C. Rep. 184. Mr. Justice Story, in delivering the opinion of the court, takes notice of the case of *Weir v. Aberdeen*, but merely remarks, "this is an important doctrine, and well worthy of discussion, whenever it comes directly in judgment." Mr. Chancellor Kent, 3 Comm. 289, observes, "the argument of Lord Tenterden in favor of this doctrine is very weighty; but a doubt seems to be thrown over it by the supreme court of the United States, and cites the case of *McLanaghan v. The Universal Ins. Co.*, but forbears to express his own opinion. In *Rich v. Parker*, 7 Term Rep. 709, Lord Kenyon observed, "if a ship be not seaworthy, or in a proper condition for sailing, during a part of the voyage, nothing which happens afterwards can better her original situation, or restore the underwriter's liability. The general rule undoubtedly is, that a ship must be seaworthy at the time of her setting sail on her voyage."—1 Dow. Rep. 344. 3 Id. 24, 30, 59. *Douglas et al. v. Scougal et al.*, 4 Id. 376. 4 East, 590, 593.

It seems, however, not to be an improper qualification of the general rule, to say, that if a vessel at the outset of the voyage, be, by mistake or accident unseaworthy, owing to some defect which is immediately discovered and remedied, before any loss happens in consequence of it, the policy shall not be void for so trifling a cause, but the underwriters will be liable.—*Per Abbott, C. J., and Holroyd, J.*, 2 Barn. & Ald. 324, 326. *Hughes on Insurance*, 269.

7. By whom is the question of sea-worthiness to be determined?

It is generally a question of fact for the jury. What is a competent crew for the voyage—at what time such crew should be on board—what is proper pilot-ground—what is the course and usage of trade in relation to the master and crew being on board, when the ship breaks ground for the voyage—are questions of fact dependent upon nautical testimony, and exclusively within the province of the jury.—1 Peters' S. C. Rep. 184. When a pilot is on board, it is a question for a jury to determine, whether a particular accident arose from his neglect, default, incompetency, or incapacity.—*Catts and others v. Herbert and others*, 3 Stark. 12.

8. What is the rule as to a vessel's taking a pilot?

That a pilot of competent skill for the purpose of the voyage, is generally necessary to satisfy the warranty of sea-worthiness. Where a ship homeward-bound to the port of London, received a pilot on board at Orfordness, but left him before she reached her moorings, and afterwards a loss happened, the underwriters were held to be discharged, although it did not appear that the loss was directly imputable to want of skill on the part of those who navigated the vessel.—*Law v. Hollingsworth*, 7 Term Rep. 160.

The neglect or default of a statute pilot is no bar, unless the want of a pilot, or a duly qualified pilot, has arisen from the refusal of the master to take one, or from his wilful neglect in not heaving to, &c., &c.—4 *M. & S.* 7. 1 *Bro. & Bing.* 388. 3 *Price*, 302. 3 *Stark.* 12. 7 *Taunt.* 258. 1 *Moor*, 4. *Holt*, 35, 39. 7 *Taunt.* 309. 15 *East*, 484. *Peake's Rep.* 107.

9. What if a pilot cannot be procured ?

If the captain of a vessel about to enter a foreign harbor, uses due diligence to obtain a pilot, and fails, and then in the exercise of a fair discretion, attempts to enter, and the vessel is lost, the underwriter is responsible for the loss.—*Phillips v. Headman*, 2 *B. & A.* 330.

When there is no compulsory obligation, the propriety of taking in a pilot will depend upon the facility or difficulty of the navigation, upon the local knowledge which the master may possess, and the usual course at the place.

10. What is the rule as to a ship's documentation ?

There is an implied obligation, on the part of the insured, in the case of a policy on a ship, that the ship shall be properly documented, according to her national character. And therefore when a neutral American ship was taken by the French and condemned in a court of prize for want of a passport, as required by the existing treaty between France and America, the underwriters were held not liable, although there was no warranty or representation that the ship was American.—*Bell et al. v. Carstairs*, 14 *East*, 374. *Per Cur.* *Nonnen v. Kettlewell*, 16 *East*, 186. 4 *Taunt.* 379. *Vide etiam Christie v. Secretan*, 8 *T. R.* 192, where the premises stated in the foreign sentence were not conclusive.—14 *East*, 394, and *vide per Bailey, J.*, 15 *East*, 374. *Vide* 5 *East*, 155. 2 *Taunt.* 85.

11. Does this implied warranty apply to the owner of the goods ?

It does not. The insured, in the case of a policy on goods, is not answerable for the proper documentation of the ship, without a warranty or representation of her national character; and therefore an underwriter on goods will be liable, although the loss happens in consequence of the ship's having been improperly documented.—7 *East*, 397. 14 *Id.* 393. 16 *Id.* 176—186. 3 *Camp.* 142. 4 *Taunt.* 379. Thus when goods were insured on board an American vessel, but the policy was not effected under any warranty or representation of her being an American, although an observation to that effect was made by the broker when an unstamped slip was signed, the underwriters were held liable for a loss which happened by Spanish capture, in consequence of the ship's not having been documented according to the treaty between America and Spain.—*Dawson v. Atty*, 7 *East*, 367. 14 *Id.* 374. 14 *Id.* 46. 3 *Camp.* 85. And so there is no implied warranty on the part of the owner of goods, that the ship shall be properly cleared out; and therefore when goods were insured

on a voyage from this country to a foreign port, but from the neglect of the captain, were not inserted in the ship's manifest, as required by the statute 13 and 14 Car. II. c. 11, § 3, the underwriters were held liable for a loss which happened by the perils of the sea.—*Carruthers v. Gray*, 15 *East*, 35. 3 *Camp*. 142. And as to what is a clearance, and the meaning of the term clearing out, see *Morgan v. Oswald*, 3 *Taunt.* 554. And per *Gibbs, C. J.*, 1 *Marsh. Rep.* 206. 5 *Taunt.* 533. 6th *Geo. IV. c.* 107, § 55—80.

12. What is necessary to satisfy the warranty of the ship's national character?

A ship must be properly documented at the commencement of the voyage, and if she be not properly documented at the time of sailing, the underwriters will be discharged, although the loss happens from another cause; but where the obligation to be properly documented is merely implied, the underwriter will not be discharged on account of the ship's being insufficiently or improperly documented, unless the loss happens from that cause. Thus an express warranty that a ship is American, means that she shall be so documented as to be entitled to the privileges of an American flag. An American ship, warranted to be American property, is impliedly warranted to conduct herself during the voyage as an American; and an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character.—*Fitzsimmons v. The Newport Ins. Comp.* The fact of clearing out for a blockaded port, is itself innocent, unless it is accompanied with a knowledge of the blockade.—*Fitzsimmons v. The Newport Ins. Co.*, 4 *Cranch*, 185.

13. If a policy insure against unlawful restraints and detainment of all kings, princes, &c., to what does the qualification ("unlawful,") extend?

It extends in its operation, as well to restraints and detainments, as to arrests; and in such a case, a detainment by a force lawfully blockading a port is not a peril insured against, by a policy containing a warranty of neutrality.—*McCall v. Marine Ins. Co.*, 8 *Cranch*, 59. 2 *Cond. Rep.* 604.

Where property is warranted by the assured, free from any charge, damage, or loss, which may arise in consequence of any seizure or detention, for, or on account of, any illicit trade, to constitute a breach of this warranty, both the illicit trade, and the fact of seizure, must concur.—*Graham v. Penn. Ins. Co.*, 2 *Wash. C. C. R.* 113. 2 *Cond. Rep.* 604.

Where the goods insured are warranted "free from any loss which may arise in consequence of seizure or detention, for, or on account of, illicit or prohibited trade," it is immaterial whether or not the insured knows that the trade is prohibited. Such a warranty amounts to a stipulation that the trade in which the insured shall engage, shall be lawful to the purpose of protecting the property insured; that it shall not only be lawful in fact, but that it shall not become otherwise by the misconduct of the insured, or from the want of all necessary documents required by the laws and regulations of the country to legitimate it.—*Smith et al. v. Delaware Ins. Co.*, 3 *Wash. C. R.* 127. 2 *Cond. Rep.* 604.

By the warranty of American neutral property, the assured engages it shall not lose that character during the voyage insured, by any omission of the insured or his agents; that it should have all the necessary documents to establish its neutrality, if questioned, required by treaties, or the law of nations.

If for want of papers required by the law of nations or treaties, or if by unneutral conduct, a loss ensues, or even an impediment occurs, though a loss is not the consequence, the warranty is not complied with.—3 *Wash. C. C. Rep.* 170. *Livingston v. Maryland Ins. Co.*, 6 *Cranch*, 274. *Baudwy v. Union Ins. Co.*, 2 *Wash. C. C. Rep.* 391. 1 *Cond'y's Marsh. on Ins.* 473.

The warranty of neutrality extends not barely to the fact of the property being neutral, but that the conduct of the voyage shall be such as to protect and preserve its neutral character. If the papers be denied to a belligerent, and the property is thereby thrown into jeopardy, such conduct constitutes a breach of warranty.—*Per Story, J., Livingston & Gilchrist v. The Maryland Ins. Co.*, 2 *Condensed Rep.* 589. 7 *Cranch's Rep.* 506. The belligerent right of search draws after it a right to the production and examination of the ship's papers.—*Per Story, J., Ibid.*

14. Where one of two parties in a cargo makes insurance, and in the policy there are these words, "warranted by the assured to be neutral property," does this warranty extend to the whole cargo?

It does not. If the interest of one joint owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality, if the other joint owner, whose interest is not insured, be a belligerent.

The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.—*Livingston & Gilchrist v. The Maryland Ins. Co.*, 6 *Cranch*, 274. 2 *Cond. Rep.* 603. That can alone be a warranty which is introduced into the policy.—*Maryland Ins. Co. v. Ruden's Administrator*, 6 *Cranch*, 338. 2 *Cond. Rep.* 604.

As to what will be sufficient to discharge the underwriters of a policy containing a memorandum stipulating that the assurers shall not be liable for any charge, damage, or loss which may arise in consequence of seizure or detention, for, or on account of, illicit trade, or trade in articles contraband of war. It has been held that this provision is not to be construed that there must be a legal or justifiable cause of condemnation, but that there must be such a cause for seizure and detention.

The following circumstances were held to support the above doctrine. The ship insured, when seized, had not unloaded all her outward cargo, but was still in the progress of the outward voyage, originally designated by the owners. She sailed on that voyage from Providence, R. I., with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination, and false papers, which yet accompanied the vessels; the contraband articles had been landed, before the policy, which was a policy on time, designating no particular voyage, had attached; the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and the

alleged cause of the seizure and detention was the trade in articles contraband of war, by the landing of the powder and muskets, which formed a part of the outward cargo. By the principles of the law of nations there existed under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture; notwithstanding the prior deposit of the contraband goods, there was a legal and justifiable cause of seizure.—In *Church v. Hubbard*, 2 *Cranch*, 187. 2 *Cond. Rep.* 385, where the exception was “that the insurers do not take the risk of illicit trade with the Portuguese, and the insurers are not liable for seizure by the Portuguese for illicit trade,” the main question was, whether an attempt to trade, not consummated by actual trading, was within the exception. The court held that it was. On that occasion, the Chief Justice said, “no seizure not justifiable under the laws and regulations established by the crown of Portugal for the restriction of foreign commerce, with its dependencies, can come within this part of the contract; and every seizure which is justifiable by those laws and regulations must be deemed within it.” And applying this language to the circumstances of the present case, we may add, that no seizure or detention, not justifiable by the law of nations, can come within the present exception, and every seizure which is justifiable by the law of nations, must be deemed within it. The cases of *Smith v. The Delaware Insur. Co.*, 3 *Serg. & Rawle*, 74. *Faudel v. The Phoenix Ins. Co.*, 4 *Serg. & Rawle*, 29. *Johnson & Weir v. Ludlow*, 1 *Caines’ Cases in Error*, 29. *S. C.* 2 *Johns. Cas.*, 481, adopt a similar doctrine, if they do not proceed beyond it. The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise; and it cannot be denied that it was perfectly justifiable in principle.—*The Franklin*, 3 *Rob.* 217. *Neutralitet*, 3 *Rob. R.* 295. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule.—*The Edward*, 4 *Rob. R.* 68, also *the Nancy*, 3 *Rob. R.* 122. *The Christianberg*, 6 *Rob.* 676. *The Rosalie & Elizabeth*, 4 *Rob. R.* *The Baltic*, 1 *Acton’s Rep.* 25, and that of *the Margaret*, 1 *Acton’s Rep.* 333. We cannot but consider these decisions as very high evidence of the law of nations, as actually administered; and in their usual application to the circumstances of the present case, they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we trust, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and *bona fide* conduct on the part of the neutrals, in the course of their commerce in times of war; and if the latter will make use of frauds and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation.—*The Amiable Isabella*, 6 *Wheat. Rep.* 1. 5 *Cond. Rep.* 1. *The Dos Hermanos*, 10 *Wheat. Rep.* 306. 6 *Cond. Rep.* 109. *The Melomane*, 5 *Rob.* 41. *The Elsebe*, 5 *Rob.* 174. *The Maria Française*, 6 *Rob.* 282. The sixth and last question is, whether, supposing the ship to have

traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in the port of Peru, then under the royal authority, before she had discharged her outward cargo, for or on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular. The question is understood to raise the point, whether, if the seizure and detention be *bona fide* for and on account of the illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, are necessary to discharge the underwriters. We are of opinion that they are not. If the seizure or detention be lawfully made, for or on account of illicit or contraband trade, all charges, damages, and losses consequent thereon, are within the scope of the exception. They are properly attributable to such seizure and detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act, they are discharged from the consequences of it. The whole reasoning in *Church v. Hubbard*, 2 *Cranch*, 187, presupposes, that if the underwriters be exempted from the risk of a justifiable seizure for illicit trade, they are not accountable for losses consequent thereon, whether arising from a sentence of condemnation or otherwise.—*Carrington et al. v. Merchants' Insurance Company*, 8 *Peters' S. C. Rep.* 516, 523.

15. What effect has a condemnation in a foreign court of admiralty, upon a neutral warranty?

The sentence of a foreign court of admiralty, held in the territories of a belligerent or his ally in the war, condemning a ship or goods taken as prize, affords conclusive evidence against a warranty of neutrality.—*Havelock v. Rockwood*, 8 *T. R.* 268. *Oddy v. Bovill*, 2 *East*, 473. 2 *Rob. Adm. R.* 210, a *Case of Flad. Oyen*, 1 *Rob. A. R.* 135, 139, &c. 8 *T. R.* 270, n. 2 *Rob.* 209. *Ib.* 319. The sentence of a foreign court of admiralty was held conclusive in the case of *Hughes v. Cornelius*, Sir *T. Raym.* 473. *Skin.* 59. *Carth.* 32. 2 *Shower*, 235, *S. C. cited* 1 *Shower*, 6, 146. 2 *Lord Raym.* 893, 936, which was an action of trover. See also, *Com. Dig. Admiralty*, E. 17. *Bake v. Thyrowhite*, 3 *Mod.* 149. 1 *Shower*, 6; and since that time, it has been repeatedly held that such a sentence is conclusive to negative a warranty of neutrality.—*Lothian v. Henderson*, 3 *Boss. Pull.* 449, 512, 513, 516, 517, 545, 547, in *Dom. Proc. Dougl.* 554. 7 *T. R.* 697. 8 *T. R.* 196, 197. 8 *T. B.* 438. 3 *Boss. & Pull.* 201. 2 *East*, 473. 5 *Ibid.* 155. 2 *Taunt.* 85, and *S. C. in Error*, 15 *East*, 46, 70, 364, and other cases *infra*. But the propriety of giving this conclusive effect to the sentence of a foreign court, has been questioned, and the mischief sometimes arising from it, shown, 3 *Boss. & Pull.* 506, 537, 544. *Campb.* 431, 432. 7 *T. R.* 697, &c. Justice also requires that reference should be made on the subject of these sentences, to the cases of *Mayne v. Walters*, *K. B. E. T.* 22 *Geo.* 3, *Park on Insurance*, 306, 531. *Barzillay v. Lewis*, *K. B. T. T.* 22 *Geo.* 3, *Park*, 526. 8 *T. B.* 441. *Salonci v. Woodmas*, *K. B. T. T.* 24 *Geo.* 3, *Park on Ins.* 528. *Kuderslay v. Chase*, *Park, Ins.* 544. The whole subject is discussed with much learning and ability.—*Park, Ins. Co.* 18. *Marshall on Ins.* b. 1, c. 9, § 6. See also the comment upon these cases in *Lothian*

v. Henderson, 3 *Boss. & Pull.* 516, 527. *Baring v. Clagget*, *Ibid.*, 215. 7 *T. B.* 696. 8 *T. R.* 234, 437, 441, *per Lawrence, J.* 2 *New Rep.* 489. The sentence to be available, must be produced in evidence under the seal of the court, 2 *New Rep.* 228, 4 *Campb.* 30; although it may have been handed over to the insurer with the other papers, to satisfy him of the loss, 3 *Campb.* 215, unless by a rule of court made by consent.—*Com. Dig. Admiralty, E.* 18. *Bernardi v. Motteux*, *Dougl.* 575, *per Lord Mansfield*, *vide* 3 *Boss. & Pull.* 545. *Le Caux v. Eden*, *Dougl.* 572. *Paith v. Pearson*, 6 *Taunt.* 439. 2 *Marsh. Rep.* 133. 4 *Campb.* 357. 1 *Holt*, 113. 5 *T. R.* 112. 13 *East*, 284. 2 *East*, 473. *Geyer v. Aguilar*, 7 *T. R.* 681. 8 *T. R.* 437, &c. *Ibid.*, 567, &c. *Crawford v. Hunter*, 8 *T. R.* 22, 24, 25, *per Lord Kenyon*, 2 *New R.* 319, 320. 4 *Taunt.* 120, 126. *Case of the Harmony*, 8 *T. R.* 720, *a. in notes.* 1 *Rob. A. R.* 135. 8 *T. R.* 277, *per Lord Mansfield in Gross v. Wethers*, 2 *Barr.* 694.

This conclusive effect of the sentence of a foreign prize court, is founded upon principles of convenience, and was intended to obviate the uncertainty and confusion which would arise if the sentence of a court, deciding on a question of property in a prize, should not be deemed conclusive in another state.—*Hughes v. Cornelius*, *Sir T. Raym.* 473. 2 *Show.* 232. 2 *Lord Raym.* 893, 936. 7 *T. R.* 697. 1 *Atk.* 49. 5 *East*, 110, 115; but see that this comity is not universally recognized in other countries.—1 *Campb.* 433, *and the authority there cited.* *Id.*, *Ibid.* It follows that when a foreign court, having jurisdiction in matters of prize, has condemned a ship and goods as enemy's property, or as lawful prize, or as having violated the law of nations, or the faith of treaties, a sentence so pronounced is conclusive against a warranty of neutrality.—*Lothian v. Henderson*, 3 *Boss. & Pull.* 499, 512, *and passim.* *Bernardi v. Motteux*, *Dougl.* 575, or 554, *cited Ibid.* *Christie v. Secretan*, 8 *T. R.* 196. *Per Lord Kenyon.* 8 *T. R.* 438, 439. 3 *Boss. & Pull.* 517, 525, &c. 8 *T. R.* 196, 234, 235. 5 *East*, 99, 155. So a judgment for breaking a blockade affords conclusive evidence that the blockade has been violated. 6 *Taunt.* 375, 376, 377. 2 *Marsh. Rep.* 27, *Everth v. Hannan.* And although reason may be stated on the face of the sentence which are unsatisfactory, and the foreign court, while professing to decide according to the law of nations, may have arrived at their conclusion through a wrong medium, although they appear to have misinterpreted the law of nations, or misconstrued the provisions of a treaty upon which their decision was founded, still, as the grounds of the sentence are not examinable in a court of law, the adjudication is conclusive.—5 *East*, 99, 155. 2 *Taunt.* 55. 2 *New Rep.* 489. 3 *Boss. & Pull.* 216, 526, 545.

The sentence is equally to be regarded as evidence of the facts inducing the condemnation, and upon which the condemnation proceeds, as of the judicial act of condemnation.—*Bell v. Carstairs*, 14 *East's Reports*, 314. *Geyer v. Aguilar*, 7 *Term Reports*, 681. *Garretts v. Kensington*, 8 *Term Reports*, 230. In the case of an insurance upon ship, goods and freight, all belonging to nearly the same American proprietors, which, as it appeared by the sentence, had been condemned on account of the common default of all the proprietors in their joint character of ship owners, in not having a regular passport on board, as required by

the treaty of their own state with France, it was holden that the assured could not claim from the underwriter an indemnity for the loss thus occasioned by themselves, although the ship was not warranted or represented to be an American; for the ship owner is bound to have such documents as are required by treaties with particular nations on board, to evince his neutrality in respect to such nations. By the sentence of a French Court of Admiralty, it appeared that the ship insured, "warranted American," had been condemned as enemy's property, for want of having on board a *rôle d'équipage*, or list of the crew, such as was required by a marine ordinance of France, and adjudged by the court there to be requisite within the meaning of the treaty of commerce between France and America, it was holden to be conclusive evidence against the warranty of neutrality, though, in fact, the ship was American. So where the sentence states, that the ship was condemned on the ground of having violated her neutrality, and acted contrary to the law of nations and the faith of treaties, such sentence is conclusive evidence against the warranty of neutrality. But where the grounds of confiscation are stated obscurely, and the court cannot collect what the precise ground was, *Bernardi v. Motteux*, Doug. 574; *Fisher v. Ogle*, 1 Camp. 418; or where the sentence adjudges the ship to be lawful prize—not because it is enemies' property, but for reasons which lead to a contrary conclusion—*Calvert v. Boville*, 7 T. Rep. 523, recognized by *Tindall, Ch. J.*, delivering judgment in *Dalglish v. Hodgson*, 7 Bingham, 504; or if it appear that the condemnation proceeded solely on the ground of the ship having violated an *ex parte* ordinance, to which the neutral country had not assented.—*Bird v. Appleton*, 8 T. Rep. 562. In such cases the sentence is not conclusive evidence against the warranty of neutrality. It is to be observed, also, that the sentence of a foreign court, where it is conclusive, is conclusive only as to the grounds of the sentence, and not as to the premises which led to the conclusion.—*Christie v. Secretan*, 8 T. R. 192. The preceding remarks, as to a foreign sentence of condemnation being conclusive evidence against the warranty of neutrality, must be confined to legal sentences, that is, sentences of a prize court, acting and exercising functions either in the belligerent country, or in the country of a co-belligerent or ally in the war; *Oddy v. Boville*, 2 East, 473; for sentences of condemnation, pronounced by the authority of the capturing power, *within the dominion of a neutral country*, to which the prize may have been taken, are illegal, *Havelock v. Rockwood*, 8 T. R. 268, and consequently inadmissible. And that is to be considered as a neutral country for this purpose.—*Donaldson v. Thompson*, 1 Campb. 429, in which the forms of an independent neutral government are preserved, although a belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority.—14 East, 394. 16 East, 176. *Price v. Bell*, 1 East, 663. Here there was no express warranty of neutrality, but the point in judgment was, that the sentence was not conclusive. Quere, if the sentence would not now be considered as founded on the breach of the treaty, and therefore conclusive.—*Vide* 5 East's Rep. 105, 155. *Everth v. Hannan*, 6 Taunt. 375. 2 Marsh. Rep. 72. *Fisher v. Ogle*, 1 Campbell, 418. 2 Campb. 151. 2 Rob. Ad. Rep. 210. 1 Rob. Ad. Rep. 135. *Smith v.*

Surridge, 4 *Esp.* 26. The admissibility of a sentence of condemnation in evidence, can only be contended for upon the supposition that it contradicts the truth of the warranty, which can only be when the ship is condemned as enemy's property, or as not being neutral, or as lawful prize, &c., that is, for some cause inconsistent with the warranty.—3 *Boss. & Pull.* 525, 526.

The conclusiveness of a foreign judgment has not been uniformly admitted in the United States, but the most distinguished judges and jurists of the country argue strongly in favor of the rule as settled in England, and laid down by some of the most eminent continental writers on international jurisprudence, that the *exceptio rei judicatæ* is final and conclusive. Mr. Chancellor Kent, 2 *Commentaries*, 120, contends that the rule is founded on a principle of general jurisprudence and public convenience, sanctioned by the usage and courtesy of nations, and cites *Hughes v. Cornelius*, Sir T. Raym. 483. *Borrows v. Jemine*, Stra. 733. *Hamilton v. The Dutch East India Company*, 8 Bro. C. P., by Tomlins, 264. *Lothian v. Henderson*, 3 *Boss. & Pull.* 499. *Graham v. Maxwell*, 2 Dow Par. Cases, 314. Lord Ch. J. Eyre, in *Phillips v. Hunter*, 2 H. Blacks. Rep. 410. *Tarlton v. Tarlton*, 4 Maule & Selw. 20. *Vattel*, b. 2, ch. 7, sec. 84, 85, *Martin's Summary of the Law of Nations*, b. 3, ch. 3, sec. 20. *Ersks. Inst. of Scot. Law*, vol. II., p. 735. *Kaimes' Pr. of Equity*, vol. II. p. 366.

Mr. Justice Story, in *Commentaries on Conflict of Laws*, 507, supports the same conclusions, and says, there is much reason to contend that the present inclination of the English courts of common law, is to sustain the conclusiveness of such judgments.—See *Guinness v. Carroll*, 1 Barn. & Adolph. 459. *Becquet v. McCarthy*, 2 Barn. & Adolph. 951. And it is very difficult to perceive what could be done if a different doctrine were maintained to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment. It can be well understood that a defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had notice of the suit, or that it was procured by fraud, or that upon its face it is founded in mistake; or that it was irregular, and bad by the local law *rei judicatæ*. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is, in legal effect, the right to re-try it at large, and to put the defendant upon proving the original merit.—*Arnot v. Redfern*, 2 Carr. & Payne, 88 S. C. 3 Bing. Rep. 353. *Noville v. Rassi*, 2 Barn. & Adolph. 757. *Douglass v. Forrest*, 4 Bing. Rep. 668. *Obincini v. Bligh*, 8 Bing. Rep. 335; see also *Starkie on Evidence*, p. 2, § 67. *Phillips on Evidence*, 6th ed. p. 333. *Buttrick v. Allen*, 8 Mass. Rep. 273. *Huberas Lib. tit. 2. De Conflictu*, § 6. The general doctrine maintained in the American courts in relation to foreign judgments, certainly is, that they are *prima facie* evidence, but they are impeachable. But how far, and to what extent this doctrine is to be carried, does not seem to be definitely settled. It has been declared that the jurisdiction of the court may be inquired into, and its power over the parties and things; and that the judgment may be impeached for fraud.—*Bissel v. Briggs*, 9 Mass. Rep. 462. *Borden v. Fitch*,

14 *Johns. Rep.* 121. *Green v. Sarmiento*, 1 *Peters' Circuit Rep.* 74. *Field v. Gibbs*, 1 *Peters' Cir. Rep.* 155. *Aldrich v. Kinney*, 4 *Conn. R.* 380. *Shumway v. Stillman*, 6 *Wend. Rep.* 447. *Hall v. Williams*, 6 *Pick.* 247. *Starbuck v. Murray*, 5 *Wend. Rep.* 148. *Davis v. Peckars*, 6 *Wend. Rep.* 327. *Buttrick v. Allen*, 8 *Mass. Rep.* 273. *Pawling v. Bird's Exrs.*, 13 *Johns. Rep.* 192. *Hitchcock v. Aiken*, 1 *Caines' Rep.* 460. *Watson's Dig. Judgment*, 1. *Bigelow's Dig. Judgment*, H. *Johnson's Digest*, *Debt. H. Cox's Digest*, *Judgment*. *Hoxie v. Wright*, 2 *Vermont Rep.* 263. *Bellows v. Ingraham*, 2 *Vermont Rep.* 575. *Barney v. Patterson*, 6 *Harris & Johns.* 182. *Goix v. Low*, 1 *Johns. Cas.* 393. *Taylor v. Bryden*, 8 *Johns. Rep.* 178. *Taylor v. Phelps*, 1 *Harris & Gill's Rep.* 492.

There is one exception in the jurisprudence of some of the states, as to the force and effects of foreign sentences in the prize courts of admiralty, bearing upon neutral rights; while those sentences are regarded in the courts of the United States as binding and conclusive upon the same question.—*Croudson v. Leonard*, 4 *Cranch*, 434, which was an action on a policy of insurance. The only point below was relative to the evidence by which the commission of a breach of blockade could be substantiated, and the court laid down the following doctrine: A sentence of a British prize court in Barbadoes was given in evidence, by which it appeared that the vessel was condemned for attempting to commit a breach of blockade. *Per Cur.* It is the English doctrine, and the correct doctrine on the law of nations, that an attempt to commit a breach of blockade is a violation of belligerent rights and authorizes capture. This doctrine is not denied; but the plaintiff contends that he did not commit such an attempt, and the court below permitted evidence to go to the jury, to disprove the fact on which the condemnation professes to proceed. On this point, I am of opinion that the court below erred. I do not think it necessary to go through the mass of learning on this subject which has so often been brought to the notice of the court, and particularly in the case of *Fitzsimmons*, argued at this term. Nearly the whole of it will be found very well summed up in the eighteenth chapter of Mr. Parke's Treatise. The doctrine appears to me to rest upon three very obvious considerations: the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction—the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law—and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world. I am of opinion that the sentence of condemnation was conclusive evidence of the commission of the offence for which the vessel was condemned, and as that offence was one which vitiated the policy, the defendants ought to have had a verdict.

Justice Washington, in a separate opinion, observed, if the injustice of the belligerent powers, and of their courts, should render this rule oppressive to the citizens of neutral nations, I can only say with the judge who decided in the case of *Hughes v. Cornelius*, let the government, in its wisdom, adopt the proper means to remedy the mischief. I hold the rules of law, when once firmly established, to be beyond the control of those who are merely to pronounce what the law is; and if from any circum-

stances it has become impolitic, in a national point of view, it is for the nation to annul or to modify it. Till this is done by the competent authority, I consider the rule to be inflexible.

Judges Chase and Livingston dissented, and Judge Todd not having been present at the argument, gave no opinion, so that this judgment is reversed by the opinions of Marshall, C. J. Cushing, Washington, and Johnson, Justices.

In *Fitzsimmons v. The Newport Ins. Co.*, 4 Cranch, 185, this question was raised, but a decision of the point was expressly waived by the court. The suit was instituted to recover from the underwriters the amount of a policy insuring the brig John, on a voyage from Charleston to Cadiz. The vessel was captured on her passage by a British squadron then blockading that port, was sent into Gibraltar for adjudication, and was there condemned by the court of vice-admiralty as lawful prize. The assured warrants the ship to be American property, and the defence was, that this warranty is conclusively falsified by the sentence of condemnation, for a breach of blockade.

Per Cur. The sentence declares the said brig to have been cleared out for Cadiz, a port actually blockaded by the arms of our sovereign lord the king, and that the master of the said brig persisted in his intention of entering that port, after warning from the blockading force not to do so, in a direct breach and violation of the blockade thereby notified.

The sentence does not deny the brig to have been American property.

The treaty between the United States and Great Britain is presumed to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it. Neither the law of nations nor the treaty, admits of condemnation of the neutral vessel for the intention to enter a blockaded port unconnected with any fact.

Had this sentence averred that the brig John had broken the blockade, or had attempted to enter the port of Cadiz, after warning from the blockading force, the cause of condemnation would have been justifiable; and without controverting the conclusiveness of the sentence, the assured could not have entered into any inquiry respecting the vessel. But this is not the language of the sentence.

The cause of condemnation, then, as described in the sentence, is one which by express compact between the United States and Great Britain, is an insufficient cause.

The sentence of the court of vice-admiralty in Gibraltar, therefore, is not considered as falsifying the warranty that the brig John was American property, or as disabling the assured from recovering against the underwriters in this action.

This case was elaborately argued, and the following cases cited to show the conclusiveness of condemnation:—3 Co. 29. 7 Id. 42. Bul. N. P. 234. Park, 177, 178. Crath. 225. Moses v. Mc Ferlan, 2 Burr. 1005. Doug. 1. Lord Kaim's Principles of Equity, 369—375, Rapaljea v. Enory, 2 Dal. 51, 231. Penhallow v. Doane, 3 Dal. 270. 2 N. Y. Cas. in Error, 226. Molly v. Shattuck, 3 Cranch. 488. 5 East,

165. *Rose v. Himeley*, 4 *Cranch*, 241. *Hudson et al v. Guestier*, 4 *Cranch*, 293.

A condemnation for want of claim is not conclusive.—*The Mary*, 9 *Cranch*, 126. *The Gran Para*, 7 *Wheat*. 471.

The courts of the United States will not question a condemnation in a French court of admiralty, of property carried into the port of an ally.—*Sheaff et al. v. Seventy Hogsheads of Sugar, Bee*, 163. *McGrath v. Candellero*, *Id.* 60.

There has been some difference of opinion, as to the effect to be given to foreign condemnations, in the state courts. They were declared to be conclusive upon neutral rights, according to the English rule, by the courts of law in New-York.—*Ludlows v. Dale*, 1 *Johns. Cas.* 16. *Vandenheuvael v. Utica Ins. Co.*, 2 *Ind.* 127. But the doctrine in those cases was reversed in the court of errors.—2 *Id.* 451. And it is now settled not to be conclusive.—*De Wolf v. New-York Ins. Co.*, 20 *Johns. Rep.* 214; *confirmed in Error*, 2 *Cowen's Rep.* 56. *Le Roy v. United Ins. Co.*, 7 *Johns. Rep.* 343. *Duget v. Rhinelander*, 1 *Caines' Cas. in Error*, 43—47.

They were declared to be conclusive by the supreme court of Pennsylvania, in 1 *Binney's Rep.* 299, *note*; but the legislature of that state, by an act passed in March, 1809, declared that they should not be held conclusive.

They were held to be binding in South Carolina.—2 *Bay.* 242. In Connecticut, 1 *Day*, 142. In Massachusetts, 6 *Mass. Rep.* 277. In Maryland *Gray v. Swan*, 1 *Har. & Johns.* 142; but an act of the legislature of Maryland, in 1813, ch. 164, reduced the sentences of condemnation, of foreign prize courts, to the character of *prima facie* proof.

They were held conclusive in *Blanque v. Patavia et al.*, 4 *Martin's Lou. Rep.* 456. *Cucullu v. Louisiana Ins. Co.*, 17 *Idem*, 464. *Brown v. Union Ins. Co.*, 4 *Day's Conn. Rep.* 179. *Kroning v. The Union Ins. Co.*, 1 *Nott & M'Cord's S. Ca. Rep.* 537. *Gelston v. Hoyt*, 3 *Wheat. U. S. Rep.* 315. *Brown v. United Ins. Co.*, 4 *Day's Conn. Rep.* 179. *Baxter et al. v. New Eng. Ins. Co.*, 6 *Mass. Rep.* 277. *Vasse v. Ball*, 2 *Dall. Penn. Rep.* 270. *Calhoun v. Ins. Co. of Pennsylvania*, 1 *Bin. Penn. Rep.* 293. *Contra, De Wolf v. New York Ins. Co.*, 20 *Johns. N. Y. Rep.* 214. *S. C. in Error*, 2 *Cowen's Rep.* 56.

In an action upon a policy on property, warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty. This was so determined by the supreme court in *Livingston et al. v. The Maryland Ins. Co.* That action was brought by the owners of the cargo of the *William and Mary*, to recover from the Maryland Insurance Co. the amount of the policy, insuring the cargo of that vessel. The cargo was warranted to be American property, and the vessel to be an American bottom, "proof of which was agreed to be required of the United States only."

Per Cur. Is the sentence of a foreign court of admiralty, in this case, conclusive evidence of the fact it asserts? It is fair to consider the reservation of the right of giving proof in the United States, which, in direct terms, refers to the whole warranty, as intended by the parties to be co-

extensive with a warranty itself, and as the conduct of the vessel was, in legal construction, comprehended in the warranty of her neutrality, that the conduct of the vessel would, in legal construction, be comprehended in the reservation of a right to make proof in the United States. The majority of the court, therefore, is of opinion that the circuit court did not err in submitting the testimony respecting the conduct of the vessel, in this case, to the jury.—*Livingston & Gilchrist v. The Maryland Ins. Co.*, 6 Cranch, 274. *Williams v. The Suffolk Ins. Co.*, 13 Peters' S. C. Rep. 415. In Virginia such a sentence is held not to be conclusive in an action on a policy.—*Bourk v. Cranberry*, 1 Gilmore's Rep. 16. *Maryland Ins. Co. v. Bathurst*, 5 Gill & Johns. 159.

In France, and perhaps, nearly all the states of continental Europe, a sentence of condemnation is not received as conclusive evidence of a breach of neutral warranty.—*Cleirac*, tit. de la Jurisdiction, art. 33, No. 6. *Valin sur l' art.*, 26, de l' Ord., tit. des Ass. *Emerigon*, tome 1, p. 458. *Boulay Paty, Cours droit Com. Mar.* tome iv., 27. *Merlin, Ques. de Droit*, tit. Jud. Lec. 14. *Ib. Rep. de Juris. tit. Jud., Lec. 6. Code Civil*, No. 2123. *Toulier, Droit Civil Fran.*, tome x., No. 76–86. *Parlessus, Droit Comm.*, tome v. 1488. 1 *Boullenois*, 603, cites *Burgundus*.

In England a sentence of condemnation is conclusive, although it may appear, that by the constitution of the court, an appeal lies to a higher court of admiralty, and no appeal has been instituted, when the sentence is produced in evidence.—*Tyson v. Gurney*, 3 T. R. 478, 479. *Lord Mansfield*, in *Bernardo v. Motteux*, Doug. 559, old ed. A sentence of restitution is not less conclusive than a sentence of condemnation.—*Siffkin v. Lee*, 2 Boss. & Pull. N. R. 484. *Vide Mullet et al. v. Shedd*, 13 East, 304. *Per Heath, J.*, 2 Boss. & Pull. N. R. 489.

OF THE PERILS WITHIN THE POLICY.

1. With what perils, according to the general rule, does the insurer charge himself?

With all the maritime perils that the thing insured can meet with on the voyage, *prestare tenetur, quodcunque damnum obveniens in mari*.

It was an ancient opinion stated by Santerna, that the insurer was not responsible for very unusual and extraordinary perils not specially stated. But such a principle is now utterly exploded, and the policy sweeps within its enclosure every peril incident to the voyage, however strange or unexpected, unless there be a special exception.—*Santerna de Ass. part 3*, n. 72. *Ord. de la mar. tit. Ass. art. 20. Code, art. 350, Boulay Paty*, tome 4, 9. The perils enumerated in the common policy, are sufficiently comprehensive to embrace every species of risk to which ships and goods are exposed, from the perils of the sea, and all other causes incident to maritime adventure. The enumerated list may be enlarged or abridged, at the pleasure of the parties.

2. What are the usual perils enumerated in the policy ?

1, Perils of the sea. 2, fire. 3, enemies. 4, pirates, rovers, thieves. 5, jettisons. 6, arrests, restraints, and detainments of kings, princes and people. 7, barratry. 8, mortality of slaves, or living animals. 9, all other perils, losses and misfortunes, that have or shall come, to the damage of the insured.

3. What losses come within the words "perils of the sea?"

Those which happen from the sea, and are necessarily incidental to a ship engaged in a sea voyage ; such as those occasioned by the wind and waves ; by lightning, storms and tempest ; by rocks, sands, and other natural causes.—*Com. Dig. Merchant, E. 9, Cit. 2 Roll. Abr. 248, 1, 35, Salk. 443. Shower, 523. Shaw v. Felton, 2 East, 109.* Those accidents are included which arise (according to the expression of Emerigon) *ex marinæ tempestatis discrimine*.—*Emerigon, 1 vol. c. 12. 5 M. & S. 464, 465, 466.*

4. What effect is given to the terms "sea risks in port?"

In *Patrick and others v. The Com. Ins. Com., 11 Johns. R. 9*, which was an action on a policy of insurance on the ship Thomas Jefferson, at and from New York, to Cadiz, and back again. The insurers take no risk in port but sea risk. The ship proceeded to Cadiz, and while laying off the Mole, the wind drove her ashore near the fort occupied by the French, where she lay above high water mark, and as soon as the storm abated, the French troops took possession, and burnt her.

5. What is the rule in ascribing the loss to particular peril ?

It is to regard the proximate cause, *causa proxima non remota spectatur* is a settled maxim in the law of insurance. The rule is that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners ; this has been affirmed in several successive cases in the English courts.—*Busk v. The Royal Exchange Insurance Co., 2 Barn & Ald. 82. Walker v. Martland, 2 Barn. & Ald. 171. Bishop v. Pentland, 7 Barn. & Cres. 219. The Patapsco Ins. Co. v. Coulter, 3 Peters' Rep. 222. Columbian Ins. Co. v. Lawrence, 10 Peters' S. C. Rep. 517. Walters v. The Merchants' Louisville Ins. Co., 11 Peters' S. C. Rep. 225. Peters' v. Warren Insurance Co., 14 Peters' S. C. Rep. 108. Pothier, Traité des Assurances, n. 49. Emerigon, des Assurances, Ch. 12, § 14, p. 414-417.*

6. How does this rule apply to cases of collisions ?

In the case of collision, where the ship insured is run down by another without any blame being imputed to either.—*Buller et al. v. Fisher et al., 3 Esp. Rep. 67. 3 Taunt. 4, 5. Abbot on Ship., 5th ed. 255. 4 Campb. 289. 1 Stark. 138. 5 M. & S. 466 ;* or where the collision happens through the default of the other vessel.—*Smith v. Scott, 4 Taunt.*

126; or even from the neglect of the crew of the ship insured.—4 *Taunt.* 127. 2 *Barn. & Ald.* 75. 5 *Id.* 171. 14 *East*, 481. 7 *T. R.* 160. The loss in each case seems to be, properly ascribable to the perils of the sea.—*Hagedorn & others v. Witmore*, 1 *Stark. Rep.* 157. So where a press-gang seized two of the mariners who had been dispatched to cast off a rope while the ship was moving from port to port in a harbor, and the vessel in consequence ran ashore, this was considered as a loss by the perils of the sea, for which the underwriters were held liable.—*Hodgson v. Malcolm*, 2 *New Rep.* 336.

7. Is a sum paid as a general average contribution for a loss by collision where neither party were in fault, a loss by perils of the sea?

It is.—*Peters v. The Warren Ins.*, 14 *Peters' S. C. Rep.* 107. In this case, insurance was made to the amount of eight thousand dollars, on the ship *Paragon* for one year. The policy contained the usual risks, and among others that of the perils of the sea. The assured claimed for a loss by collision with another vessel, without any fault of the master or crew of the *Paragon*; and also insisted upon a general average and contribution. The *Paragon* was in part insured; and in November, 1836, in the year during which the policy was in operation, she sailed from Hamburg, in ballast, for Gottenburgh, for a cargo of iron for the United States. While proceeding down the Elbe with a pilot on board, she came in contact with a galliot, and sunk her. She lost her bowsprit, jib-boom and anchor, and was otherwise damaged, and put into Cuxhaven, a port at the mouth of the Elbe, and in the jurisdiction of Hamburg. The captain of the galliot libelled the *Paragon*, alleging that the loss of his vessel was caused by the carelessness or fault of those on board the *Paragon*. Upon the hearing of the cause, the court decreed that the collision was not the result of the fault or carelessness of either side; and that, therefore, according to the marine law of Hamburg, the loss was a general average loss, and to be borne equally by both parties; that is, that the *Paragon* was to bear one half of the expense of her own repairs and to pay one half of the value of the galliot; and that the galliot was to bear the loss of the half of her own value, and to pay one half of the repairs of the *Paragon*. The result of this decree was, that the *Paragon* was to pay two thousand six hundred dollars, being one half of the value of the galliot (three thousand dollars), after deducting one half of her own repairs, being four hundred dollars. The owners of the *Paragon* having no funds in Hamburg, the captain was obliged to raise the money on bottomry. There being no cargo on board the *Paragon*, and no freight earned, the *Paragon* was obliged to bear the whole loss. Upon this state of facts the question arose whether in this cause the contributory amount paid by the *Paragon* on account of the collision, was a direct, positive and proximate effect from the accident, in such sense as to render the defendants liable therefor. Upon this question the judges were opposed in opinion, and it was accordingly certified to the superior court for a final decision.

That a loss by collision without any fault on either side was a loss by

the perils of the sea, within the protection of the policy of insurance, was not doubted. So far as the injury and repairs done to the *Paragon* herself extend, it was admitted that the underwriters were liable for all the damages. The only point was whether the underwriters were liable for the contribution actually paid on account of the loss of the galliot. Mr. Justice Story held, in delivering the opinion of the court, that in a just view of the matter the collision was the sole proximate cause of the loss; and the decree of the court did but ascertain and fix the amount chargeable upon the *Paragon*, and attached thereto at the very moment of collision. The contribution was a consequence of the collision, and not a cause. It was an incident inseparably connected, in contemplation of law, with the sinking of the galliot; and a damage immediate, direct and positive from the collision. In the common case of an action for damages for a tort done by the defendant, no one is accustomed to call the verdict of the jury, and the judgment of the court thereon, the cause of the loss to the defendant. It is properly attributable to the original tort, which gave the right to damages consequent thereon; which damages the verdict and judgment ascertained, but did not cause.

But let us see how the doctrine is applied in other analogous cases of insurance, to which, as much as to the present case, the same maxim ought to apply, if there is any just foundation for it here. If there be any commercial contract which, more than any other, requires the application of sound common sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance, for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions. Take the case of a jettison at sea to avoid a peril insured against. It is a voluntary sacrifice, and may be caused by the perils of the sea, but it is ascertained long afterwards, and that ascertainment, whether made by a court of justice, or by an agreement of the parties, would, in the sense of the maxim contended for in the agreement, be the immediate cause of the contribution, and the jettison but a remote cause, and the violence of the winds and waves a still more remote cause of the jettison. General average, as such, is not *eo nomine* insured against in our policies, it is only payable when it is a consequence, or result, or incident (call it which we may) of some peril positively insured against; as, for example, of the peril of the sea. The case of a ransom after capture stands upon similar grounds. The ransom is, in a strict metaphysical sense, no natural consequence of the capture; it may be agreed upon long afterwards, and if we were to look to the immediate cause, it might be said that the voluntary act of the party in the payment was the cause of the loss. But the law treats it as far otherwise; and deems the ransom a necessary means of deliverance from a peril insured against, and acting directly upon the property. The expenses consequent upon a capture where restitution is decreed by a court of admiralty, upon the payment of all the costs and expenses of the captors, fall under a similar consideration. In such cases the decree of the court allowing the costs and expenses may be truly said to be the immediate cause of the loss, but courts of justice treat it also as the natural consequence of the capture.

A still more striking illustration will be found in the case of salvage decreed by a court of admiralty for services rendered to a vessel in distress. The vessel may have been long before dismasted or otherwise injured, or abandoned by her crew in consequence of the perils of the winds and waves; and the salvage decreed in such a case would seem, at the first view, far removed from the original peril and disconnected from it, and yet, in the law of insurance, it is constantly attributed to the original peril as the direct and proximate cause; and the underwriters are held responsible therefor, although salvage is not specifically, and in terms, insured against.

In truth, in the present case, the loss occasioned by the contribution is (as has been already suggested) properly a consequence of the collision; and in no just sense a substantive independent loss. In the next place, how stand the authorities on this subject? The only authority which has been cited by the counsel for the defendants to sustain their argument is the case of *Devaux v. Salvador*, 4 *Adolphus & Ellis' Rep.* 420. That case is certainly direct to the very point now in judgment. It was a case of collision where the assured had been compelled to pay for an injury done to another vessel by the mutual fault of both vessels, according to the rule of the English court of admiralty. The case before the King's Bench was confessedly new, and does not appear upon this point to have been much argued at the bar. It seems to have been decided principally upon the ground of the absence of any authority in favor of the assured; and, as it appears to us, in opposition to the analogies furnished by other acknowledged doctrines in the law of insurance.

The same question, however, has undergone the deliberate consideration of some of the greatest maritime jurists of continental Europe; and the result at which they have arrived is directly opposite to that of the King's Bench.—*Pothier, Traité d'Assurance*, n. 49. *Estrangin*, a very excellent modern commentator upon *Pothier*, *Estrangin's notes. Emerigon*, whose reputation as a writer on the law of insurance is second to no one, unequivocally adopts the same opinion.—*Emerig. Assur.*, ch. 12, § 14, p. 414—417. In short, all these learned foreigners hold the doctrine that wherever any thing insured becomes by law directly chargeable with any expense, contribution or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution or loss. And this they hold not upon any peculiar provisions of the French ordinance, but upon the general principles of law applicable to the contract of insurance. In our opinion this is the just sense and true interpretation of the contract.

Upon the whole we are of opinion that it be certified to the Circuit Court, that in this case the contributory amount paid by the Paragon on account of the collision, was a direct, positive and proximate effect from the accident, in such sense as to render the defendants liable therefor upon this policy.

8. What is the rule as to lighters and launches?

That goods put upon launches and transported from the ship to the

port of destination when the vessel cannot approach it, are at the insurer's risk, until landed, but goods carried from the port to the town on the back of mules are not.—*Oscar v. Louisiana Insur. Com.*, 17 *Martin's Louisiana Rep.* 386.

9. Is damage by worms a damage by perils of the sea ?

It is not. In the case of *Martin et al. v. The Salem Marine Ins. Co.*, 2 *Mass. Rep.* 420, this was a policy on a vessel and cargo, to, at, and from a foreign port, for the purpose of selling an outward and purchasing a return cargo. The court, *Sewal J.*, after referring to *Brough v. Whitmore*, 4 *Term Rep.* 206. *Pelly v. The Royal Exchange Ins. Co.*, 1 *Burr.* 347. *Rohl v. Parr*, 1 *Esp. Rep.* 445, decided, that neither the loss of the proceeds of the outward cargo, destroyed by fire at the foreign port, nor damage to the vessel from worms and climate, nor extraordinary expenditures of provisions, whether by the seamen or by sentinels placed on board by the government, nor the possible earnings of the vessel during the embargo, are losses within the policy.

10. If a ship be fired into, and sunk by a land battery, would she be considered as lost by the perils of the sea ?

She would not.—*Cullen v. Butler*, 4 *Camp.* 289. Lord Ellenborough ruled that the loss could not be ascribed to a peril of the sea, although it was one of the losses and misfortunes for which the underwriters were liable. He said it was a peril on the sea, but not a peril of the sea. The same where a merchant vessel was fired upon at sea by a British ship of war, who mistook her for an enemy, and the goods were sunk by this means.—5 *M. & S.* 461. 3 *Barn. & Ald.* 404. 1 *Stark*, 138. 1 *Stark*, 157; and so a loss by worms.—*Rohl v. Parr*, 1 *Esp. Rep.* 44. *Hunter v. Potts*, 4 *Camp.* 203.

11. How is a loss by rats considered ?

Mr. Chancellor Kent observes, (3 *Commentaries*, 300,) it has been a vexed question whether damage done to a ship by rats was among the casualties comprehended under perils of the sea, and the authorities are much divided on the question. The better opinion would, however, seem to be, that the insurer is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity, and cites, *Dale v. Hill*, 1 *Wils. Rep.* 281. *Hunter v. Potts*, 4 *Campbell's N. P. Rep.* 203. *Aymar v. Astor*, 6 *Cowen's Rep.* 266. *Roccus de Ass.*, n. 49. *Cleirac sur le Guidon*, ch. 5, art. 8, and *Emerigon*, tome 1, p. 377, 378, who cites the *Dig.* 19, 2, 13, 6, and *Casaregis*, *Straccha*, *Santerna*, *Kuricke*, and *Targa*, may all be considered as maintaining the principle, that the owner, and not the insurer, is holden for an injury by rats; and the only case that I have met with directly to the contrary is, *Garrigues v. Coxe*, 1 *Binn. Rep.* 592. The opinion of *Santerna de Ass.*, pais 4, n. 31, 32, is not consistent with his own principles, for while he admits that

an injury by rats cannot properly come under the name of *causa fortuitus*, *magis est improvisus proveniens ex alterius culpâ quam fortuitus*, he still concludes it to be a peril generally and absolutely assumed, when not controlled by usage.

12. How are missing vessels presumed to have perished?

By perils of the sea.—*Green v. Browne*, 2 *Strange*, 1199.

13. After the lapse of what time will a vessel be called a missing vessel, and be presumed to have perished?

That depends upon the circumstances: there is no precise time fixed by the English law.—*Green v. Browne*, *Strange's Rep.* 1199. *Brown v. Neilson*, 1 *Caines' R.* 525. *Gordon v. Browne*, 2 *Johns. R.* 150. *Huntsman v. Thornton*, 1 *Holt's N. P. Rep.* 242.

It has been said that, by the practice of insurers, a ship will be deemed lost if not heard from in six months after her departure for any port of Europe, or after the last intelligence from her, and in twelve months if for a greater distance.—*Park*, 107. *Houstman v. Thornton*, 1 *Holt*, 242. *Newby v. Reid*, 3 *Geo.*, 3 *Park*, 106.

When it is said that a ship has not been heard of, it is generally understood to mean, that no intelligence has been received from persons capable of giving an authentic account.—*Coster v. Reed et al.*, 6 *Barnw. & Cresw.* 19.

In the French law, a vessel not heard from is presumed to be lost after the expiration of one year in ordinary voyages, and of two years in long ones.—*Code de Commerce*, art. 375. By the ordinance of Hamburg, a ship was presumed to be lost, if bound to any place in Europe and not heard from in three months; and by the *Recopilacion des Loyes de Indias*, in Spain, if not heard from within a year and a half.—1 *Magens*, 89, 90.

14. What if a ship, supposed to be lost, re-appear after the underwriters have paid the loss?

According to a late authority, it will be for the benefit of the underwriters.—*Houstman v. Thornton*, 1 *Holt*, 242. *De Costa v. Firth*, 4 *Burrows*, 1966.

15. In case of missing vessels, when is the loss presumed to have happened?

Immediately after the date of the last news; so that if an insurance be for three months, and the vessel not being heard from, a further insurance is made for a year, and the vessel is never heard from, in that case the first insurer pays the loss.—*Boulay Paty*, tome 4, pages 246, 247. 3 *Kent*, 301.

16. How are the wages and provisions of the crew, during the necessary detention of the vessel for repairs requisite in the course of the voyage, by reason of the perils insured against, considered?

By the rule and practice of these United States, they are considered as included in the perils of the sea, and made chargeable upon the insurer.—*Walden v. Leroy*, 2 Caines' Rep. 263. *Barker v. Phoenix Ins. Co.*, 8 Johns. Rep. 307. *Padelford v. Boardman*, 4 Mass. Rep. 548. 3 Kent, 302.

17. Are goods sold by the master in a foreign port to repair damage sustained by a ship in a storm, considered to be lost by perils of the sea?

They are not, nor are the underwriters liable for the value of the goods; and therefore under a policy on goods, where the ship being disabled by the perils of the sea, was obliged to go into port to be repaired, and in order to defray the expenses of such repairs, the master having no other means of raising the money, sold part of the goods, and applied the proceeds in payment of those expenses; it was held that the underwriters were not answerable for this loss.—*Powel v. Gudgeon*, 5 M. & S. 431, and MSS. *Sarguay et al. v. Hobson*, 2 B. & C. 7. 4 Bingham, 131. 5 Barn. & Ald. 617. 1 Bing. 243. 3 Barn. & Cresw. 196. *Hughes on Insurance*, 167.

18. What is the rule as to losses by fire?

That the insured are protected against losses by fire.—*Mapes v. Eames*, 2 Stra. 1243. 1 Burr. 348. 4 T. Rep. 206. 1 T. R. 27. 26 Geo. 3, c. 86, § 2. 53 Geo. 3, c. 159. The British courts have adopted the safe and legal rule, in deciding that where the policy covers the risk of barratry, and fire is the proximate cause of the loss, they will not sustain the defence that negligence was the remote cause, and hold the assurers liable for the loss.—2 Barn. & Ald. 72. 5 Barn. & Ald. 171. 7 Barn. & Cresw. 217. 14 Com. Law Rep. 33. 2 Barn. & Cresw. 794. 14 Com. Law Rep. 129. *Patapsco Ins. Co. v. Coulter*, 3 Peters' S. C. 236. In *Waters v. The Merchants' Louisville Insur. Company*, which was an action instituted in the circuit courts of the United States for the district of Kentucky, upon a policy of insurance upon the steamboat *Lioness*. The perils insured against were those "of rivers, fire, enemies, pirates, assailing thieves, and all other losses and misfortunes which shall come to the hurt or detriment of the steamboat, her engine, tackle, and furniture, according to the true intent and meaning of the policy."

The declarations averred an interest, at the time of insurance and up to her loss, of \$16,000 in the said steamboat *Lioness*; that the said steamboat *Lioness*, her engine, tackle and furniture, after the execution of said policy and before its termination, were, by the adventures and perils of fire and the river, exploded and sunk to the bottom of Red River and utterly destroyed, so as to cause and make it a total loss; and the plaintiff averred that said steamboat was, at the time of the explosion, completely provided with master, officers and crew, and perfectly seaworthy. To this declaration the defendants filed six pleas, the second of which was as follows: that the *Lioness* was loaded in part with gunpowder, and that the officers and crew, or some of them, carelessly and negligently carried a lighted candle or lamp into the hold where the powder was stored, and

negligently handled the candle or lamp, at the time that the powder was exploded; and thereby produced the explosion and destruction of the said steamer. The question certified upon this plea, was: Does the policy cover a loss of the boat by fire, caused by the negligence, carelessness, or unskilfulness of the master and crew of the boat or any of them? Mr. Justice Story delivered the opinion of the court: It is certainly somewhat remarkable that the question now before us, should never have been directly presented in the American or English courts, viz., whether, in a marine policy (as this may well enough be called), where the risk of fire is taken, and the risk of barratry is not (as is the predicament of the present case), a loss by fire remotely caused by negligence, is a loss within the policy. If we look to the question upon mere principle, without reference to authority, it is difficult to escape from the conclusion, that a loss by a peril insured against, and occasioned by negligence, is a loss within a marine policy; unless there be some other language in it, which repels that conclusion. Such a loss is within the words, and it is incumbent upon those who seek to make any exception from the words, to show that it is not within the intent of the policy. The underwriter being therefore liable, *prima facie*, by the express terms of the policy, it lies upon him to discharge himself. Does he do so by showing that the fire arose from the negligence of the master and mariners? "If, indeed, the negligence of the master would exonerate the underwriter from responsibility in a case of loss by fire, it would also in case of a loss by capture, or perils of the sea."

I am afraid of laying down any such rule. It will introduce an infinite number of questions, as to the *quantum* of care, which, if used, might have prevented the loss.

If negligence of the master or crew, were, under such circumstances, a good defence, it would be perfectly competent and proper to examine on the trial, any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage; for all of these might be remotely connected with the loss. If there had been more diligence, or less negligence, the peril might have been avoided or escaped, or never encountered at all. Under such circumstances, the chance of a recovery upon a policy, for any loss, from any peril insured against, would of itself be a risk of no inconsiderable hazard. This is not all; we must interpret this instrument according to the known principles of the common law. It is a well established principle of that law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause; *causa proxima, non remota spectatur*: and this has become a maxim, not only to govern other cases, but to govern cases arising under policies of insurance. If this maxim is to be applied, it disposes of the whole argument in the present case, and why it should not be so applied, we are unable to see any reason.

Some suggestion was made at the bar, whether the explosion, as stated in the pleas, was a loss by fire, or by explosion merely; we are of

opinion, that as the explosion was caused by fire, the latter was the proximate cause of the loss.

In the case of *The Columbia Ins. Com. of Alexandria v. Lawrence*, 10 *Peters' R.* 507, the court thought that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against, is within the protection of the policy; notwithstanding it might have been occasioned remotely by the negligence of the master and mariners. We see no reason to change that opinion; and on the contrary, upon the present argument, we are confirmed in it.

Our opinion will be certified to the circuit court accordingly.—*Cited Busk v. The Royal Exchange Assurance Co.*, 2 *Barn. & Ald. Rep.* 73. *Walker v. Maitland*, 5 *ibid.* 173. *Bishop v. Pentland*, 7 *Barn. & Cres.* 219. *The Patapsco Ins. Co. v. Coulter*, 3 *Peters' Rep.* 222. *The Columbia Ins. Co. of Alexandria v. Lawrence*, 10 *ibid.* 507.

If sails and rigging, put on shore while the vessel is repairing at a foreign port, be burnt, they are covered by the policy.—3 *Kent's Com.* 304. *Pelly v. Royal Exchange Assurance Co.*, 1 *Burr. Rep.* 341.

The French *Code de Commerce*, art. 350, in general terms, places fire among the risks borne by the underwriters; yet the tribunals require clear proof that it was not the result of negligence or fraud on the part of the master or crew; and if that does not appear, hold the underwriters discharged. The parliament of Aix, in construing the above article, held the following language.—*Cet article n'a entendu parler que de feu qui serait arrivé par fortune de mer, et non du feu que aurait été occasionnée par la faute ou l'imprudence des marinières.*—*Boulay Paty, Cours Droit Com. et Mar.*, tome iv. 365. *Ord. de Mar.*, art. 8, 9, 14.

19. What is the meaning of the clause "lost by enemies?"

A loss by enemies occurs, when ship or goods are taken as prize *jure belli*. The word "enemies" is used in the policy in contra-distinction to the terms, pirates, robbers, thieves.—*Spencer v. Branco*, *Beawes*, 4th edit. 316. *Oom v. Bruce*, 12 *East*, 225.

20. What is the rule as to the liability of the underwriters for loss by capture?

That when a capture takes place, the underwriters are liable, whether the property in the ship captured has been altered or not.—*Marsh.* 110. 1 *Roll. Ab. R.* 139. 3 *Id.* 97. *Carth.* 423. 8 *T. R.* 24. 2 *N. R.* 319, 320. *Abbott*, 5th ed. 16. *Boulay Paty, Cours Droit Com. et Mar.*, tome 4, p. 23. *Le Guidon de la Mer*, ch. 7, art. 1.

Every species of capture, whether lawful or unlawful, and whether by friends or enemies, is also a loss within the policy.—*Il sont garans, non seulement des prises faites par des ennemis ou des pirates, mais encore de celles qui sont indûment faites par des amis, alliés ou neutres; en un mot, de toutes prises faites par hostilités, brigandage ou autrement. Qui-conque déprède quelqu'un, est un corsaire et devient un ennemi.*—*Boulay Paty, Cours Droit Com. et Mar.*, tome iv. 24. *Targa*, chap. 52, No. 11.

21. In what case is a loss properly ascribed to capture ?

Where that is the immediate and operative cause of the destruction of the thing insured; as where a ship was driven by stress of weather upon an enemy's coast, and there captured, the loss was rightly treated as a loss by capture.—*Greene and others v. Elmsley, Peake*, 212.

The construction put upon the words, pirates, rovers, and thieves, is, that these words apply to the wrongful and felonious acts of individuals, as the words "kings, princes, and people," in the policy, apply to the acts of nations in their collective capacity.—*Nesbitt v. Lushington*, 4 Term R. 788. *Boulay Paty, Cours Droit Com. tome iv*, 33.

Piracy, according to our law, includes those offences committed at sea, *Hawk*, b. 1, c. 38, § 11, which, if done on land, would have amounted to felony.—*Id.* § 10. *Com. Dig. Admiralty, E. 3.* 1 *Kent's Comm.* 183. *United States v. Smith*, 5 Wheat. 153. *Bynk. Q. J. Pub.*, b. 1, ch. 17. *Rutherford*, b. 2, ch. 9. 2 *Azuni*, 351, 361, 362., edit. N. Y. *Abreu*, part 2, ch. 7. *Bouchard*, ch. 5, § 2.

The liability of the underwriters under the word "thieves," has been said to extend only to acts of depredation committed from without, and not to thefts committed by persons on board the ship.—*Emerigon*, 533.

22. What is the rule as to jettisons ?

That a loss by jettison is within the policy. Thus, a casting away of goods on the approach of an enemy, to prevent them from falling into the enemy's hands in case the ship should be taken, is a loss by jettison within the meaning of the policy.

23. What construction is put upon the words, "arrests, restraints, and detentions of kings, princes, and people ?"

It refers only to the acts of government, for government purposes, whether right or wrong.—3 *Kent's Comm.* 303.

An arrest by a magistrate or consul, is an arrest by his prince, if it be for the public benefit; as for example, if a ship, freighted with corn, put into a port where the inhabitants are in great want of bread, and the arrest be made to relieve them.—*Estrangin*, 454. *Boulay Paty, tome iv*, 38.

An arrest and detention may be either general, as in the case of an embargo or blockade, or shutting up a port against all ships; or special, as where a certain ship or ships are arrested and detained, in port or at sea. See the distinctions, cited and observed upon, 1 *Emerigon*, 535. As to the power of the government to lay embargoes, see 1 *Blackstone's Comm.* 270, 271. 7 *Geo. III.*, c. 7. *Decis. Rotæ Genœæ*, 62. *Estrangin*, 454, 462. *Roccus*, note 60. *Boulay Paty, tome iv*, 38.

But whatever may be the distinction between the several species of seizure, it may be laid down in general that the underwriters are liable for the consequences of any arrest and detention by kings and princes, whether justifiable or not, provided it occurs within the period embraced by the insurance, and does not contravene any rule of public policy. Thus if an embargo be laid on at a foreign port, and the ship insured be seized by the

government, and converted into a fire-ship, this is a loss within the policy.—*Greene v. Young*, 2 *Ld. Raym.* 840. 2 *Salk.* 444.

24. What is the distinction between restraint and detention, as used in a policy of insurance?

In *Richardson and others v. The Maine Fire and Marine Insurance Co.* *Per Cur. Parsons, C. J.*, observed, I know no difference between the import of restraint and detention; neither have I found a book or case relating to insurance in which a different construction has been given to these words. They are respectively the effect of superior force operating directly upon the vessel. So long as a ship is under restraint, so long is she detained; and whenever she is detained she is under restraint.

In a case warranted free from British and American capture and detention, the vessel had on board a British license, and sailed for her port of destination, but was stopped at the mouth of the Chesapeake by the British squadron, and ordered back to Norfolk, where she returned, and gave up the voyage.

It was contended there was no capture or detention, within the language or meaning of the clause in the policy; that restraint was not synonymous with detention.

Per Cur. There is no difference between detention and restraint in this cause. The ship was detained and restrained by the British from proceeding on the voyage insured. Being warranted free from such detention by the assured, the plaintiff cannot recover.—*Wilson v. The United Ins. Co.*, 14 *Johns. N. Y. Rep.* 227.

25. Is an embargo by the government of the parties, within a policy containing these words, "against all restraints and detainments of kings, princes or people, of what nation, condition, or quality soever?"

It is. There is no distinction on this point, between a foreign and domestic embargo; and if the embargo intervenes after the commencement of the risk, it suspends, but does not dissolve the contract of insurance, and the insured may abandon and claim a total loss.—*Page v. Thompson*, cited in *Park on Insurance*, 109, n. 6 edit. *Odlin v. Pennsylvania Ins. Co.*, 2 *Wash. Cir. Rep.* 312. *Delano v. Bedford Ins. Co.* 10 *Mass. Rep.* 347. *McBride v. Marine Ins. Co.*, 5 *Johns. Rep.* 229. The same principle is incorporated into the new French commercial code, and it pervades universally the law of insurance.—*Code de Commerce*, art. 369. 1 *Emerigon*, 541. *Pothier, h. t. No.* 59. *Boulay Paty*, tome iv, p. 43. *La seule distinction à faire pour celui-ci est si l'arrêt de prince a lieu avant ou après les risques commencés, Ib.*

If, in case of insurance on goods, the ship is arrested before the goods are on board, the insurance becomes null. If, on the contrary, the goods are shipped before the arrest, the insurance remains in full force. But in the last case, if the insured reland his goods for better protection, or to be disposed of, the risks are ended, and the premium acquired to the insurer.

If the arrest is made in order to compel the ship to attend convoy,

the insurance continues, but the insurers are bound only to indemnify the insured for the actual damages which he has sustained by the detention.

If the arrest is made because the prince wants the ship, the insured may reship his goods on board another ship. But if the insurers are in the place, they must be notified of the arrest, and of the vessel on which the goods are reshipped. If the arrest occurs on the voyage, due diligence must be used, to give notice of it. If the arrest is because the prince wants only to take from the ship some of the goods, the insurance remains for the remainder of the goods, and the premium must be diminished proportionally. When the arrest is made, because the prince is in want of the captain, the proprietor of the ship may name another captain, and the insurance is not thereby affected.—*Le Guidon de la Mer*, chap. 9, art. 3, et 4. *Valin sur l'art. 52, titre des Assurances*. Pothier, *Traité des Assurances*, No. 60, et Emerigon, tome 1, page 552. The seizure of a British vessel, by one of his majesty's ship of war, under an apprehension that the vessel belonged to an enemy, is a loss within this breach of the policy, since it is not merely the act of an individual, but of a public authority.—*Hagedorn et al. v. Whitmore*, 1 Stark. 160.

26. What is the rule in England, where a foreigner claims against a British underwriter, after a loss, founded upon the acts of his own government?

It has been held, there is no distinction on this point, between a foreign and domestic embargo; and if the embargo intervenes after the commencement of the risk, it suspends, but does not dissolve the contract of insurance, and the insured may abandon and claim a total loss. *Page v. Thompson*, cited in *Park on Ins.* 109, n. 6 edit. *Odlin v. Pennsylvania Ins. Co.*, 2 Wash. Cir. Rep. 312. *Delano v. Bedford Ins. Co.*, 10 Mass. Rep. 347. *McBride v. Marine Ins. Co.*, 5 Johns. Rep. 299. *Campbell and others v. Innes*, 4 B. & Ald. 423. A distinction has, however, been taken between that case and a claim arising between subjects of different states, and it has been held that a foreigner could not claim against a British underwriter found on the act of his own state. In *Simeon v. Bazett*, 2 Maule & Selw. 94, Lord Eldon threw a doubt over this doctrine. The distinctions were afterwards pointedly disclaimed, and the whole doctrine exploded, on a writ of error in the exchequer chamber.—*Bazett v. Mayer*, 5 Taunt. Rep. 824. This latter doctrine has been adopted in New-York, as the true rule. The contrary doctrine was founded upon a fanciful and unreasonable theory.—*Francis v. Ocean Ins. Co.*, 6 Cowen's Rep. 404, S. C. 2 Wendell's Rep. 64. This is according to the French law.—*Boulay Paty*, tome IV. 43. *Marquardus*, lib. 2, chap. 13, n. 63.

27. What is the doctrine, where a ship is taken by the prince, to transport public stores, and is lost on the voyage, as to the liability of the prince for her value?

M. Boulay Paty, in speaking of this question, says, the learned are divided in opinion on this point, some, amongst whom are *Pekius*, *Parecius*, and *Keuricke*, hold the negative, saving certain circumstances, but

others, among whom are *Lucca and Marquardus*, say the sovereign should pay; and his own opinion is, that as the sovereign pays the freight, he is not responsible for the fortunes of the seas, unless he had agreed to make himself responsible.—*Boulay Paty*, tome iv., p. 43.

A destruction of merchandise insured by blowing up with powder of a building in which it was stored, under the direction of the chief magistrate of a city, to prevent the spreading of a conflagration, is a peril insured against in a policy against fire, and the insurers are liable for the loss. The facts upon which the above was decided were as follows. The defendant in the court below, insured the plaintiff in the sum of \$3,000 on earthenware in crates, contained in the brick slated store No. 75 Pearl-street, New-York. On the trial it appeared that in the great fire on the morning of the 17th December, 1835, the store No. 75 Pearl-street was blown up with gun-powder and the goods totally destroyed. The explosion was ordered by the mayor of the city, to arrest the progress of the fire then raging to the east of this store. The building next to the store, but not the store itself, was on fire at the time of the explosion. The buildings all around the store in every direction took fire, and were more or less burnt or totally destroyed by the course of the flames. The defendant moved for a non-suit on the following grounds. 1. That it was a remote consequence of the fire and not necessarily arising from it. 2. The fact of bringing gun-powder upon the premises suspended the policy. 3. A loss by an explosion of gun-powder cannot be said to be a loss by fire. 4. That it was a loss by an official act of the mayor, and that the corporation are liable for his acts. 5. That the loss was by a general calamity and should be borne by a tax upon the citizens at large.

The Chief Justice before whom it was tried overruled the motion. The defendants excepted, and verdict and judgment having passed against them, they brought a writ of error, upon the consideration of which the judgment below was affirmed.—*City Fire Ins. Co. v. Corlies*, 21 *Wendell*, 367 cited, *Per Cur. Grim. v. Phoenix Ins. Co.*, 13 *Johns. R.* 451. *Waters v. The Merchants' Ins. Co.*, 11 *Peters' S. C. Rep.* 213. *Duncan v. The Fire Ins. Co.*, 6 *Wend.* 488. *Drinkwater v. London Ass. Co.*, 2 *Wills*, 363. *Langdale v. Mason*, 2 *Marsh. on Ins.* 791. *The Mayor of New-York v. Lords*, 17 *Wendell*, 285. *Maison v. Sainsbury*, 2 *Marsh. on Ins.* 794. 3 *Dougl.* 61. *Columbia Ins. Co. v. Lawrence*, 10 *Peters' S. C. Rep.* 507.

28. What is the rule as to the liability of the insurer if the voyage be broken up merely through fear of capture?

That the loss is not covered by the policy. The apprehension of capture, or of any other peril *in transitu*, is no ground of abandonment. If therefore the danger be so great as to amount to almost a certainty of capture it becomes a restraint in contemplation of the policy.—1 *Emerigon*, 507—512. *Symonds v. Union Ins. Co.*, 4 *Dallas' Rep.* 417. *Schmidt v. Union Insurance Company*, 1 *Johns. Rep.* 249. *Craig v. Union Ins. Co.*, 6 *Ibid.*, 226. *Barker v. Blakes*, 9 *East*, 283. *Oliver v. Union Ins. Co.*, 3 *Wheaton's Rep.* 183. *Saltus v. Union Ins. Co.*, 15 *Johns. Rep.* 523. *Thompson v. Read*, 12 *Serg. & Rawle*, 440. *Simonds*

v. *Union Ins. Co.*, 1 *Wash. Cir. Rep.* 382. 3 *Kent's Com.* 293. *King v. The Delaware Ins. Co.*, 6 *Cranch's Rep.* 71.

29. With whom does it lie to determine whether a voyage be rightfully broken up?

The question whether the voyage be broken up, and whether the captain was justified in returning, are questions of law, and the finding thereupon by a jury, is not to be regarded by the court.—*King v. The Delaware Insur. Co.*, 6 *Cranch's Rep.* 71. 2 *Cond. Rep.* 303. 2 *Burr.* 696. *Marsh.* 486. 4 *Cranch*, 29. *Douglass*, 219. *Marsh.* 498, 505. *Park*, 168. 3 *Boss. & Pull.* 474. 3 *Caines*, 188. 1 *Johns.* 301. 5 *Boss. & Pull.* 434. 2 *Johns.* 264. 1 *Rob.* 146. 1 *Camp.* 454. *La juste crainte du péril équivalait au péril lui-même. Boulay Paty, tome 4, p. 58. Si propter aliquem metum id detrimentum factum sit, hoc ipsum sarcire oportet, b. 2, § 1, de leg. Rhod.*

30. What is the rule as to the liability of the insurer for the mortality of live animals?

In the case of policies on live stock, a clause is frequently inserted to exempt the underwriter from liability for losses by mortality and jettison. By this exemption of mortality the underwriters are protected from liability for losses by the natural death of the cattle or stock insured, but are not protected from losses occasioned by the death of the cattle or stock by violent means. And therefore, in the case of a policy on living animals, warranted free from mortality and jettison, when some of the animals were killed in consequence of the agitation of the ship in a storm, and others from the same cause received so much injury that they died before the termination of the voyage, this was held to be a loss by the perils of the sea, and not a loss by mortality within the meaning of the exception of the policy.—*Lawrence v. Aberdeen*, 4 *Barnwell & Ald.* 107. *Gabay et al. v. Lloyd*, 3 *Barn. & Cres.* 793. It seems that a death occasioned by the failure of the ship's provisions, would, according to the principles of a determination in the case of a policy on slaves, be deemed a mortality within the meaning of the exception, although the want of provisions had been occasioned by a delay of the voyage in consequence of the ship's having encountered sea perils.—*Lawrence v. Aberdeen*, 5 *B. & A.* 111. *Tatham v. Hodgson*, 6 *T. R.* 656. By the French law, the insurers are not liable for the natural death of animals.—*Les assureurs ne sont pas tenus de la mort naturelle des animaux ; ce n'est pas un dommage arrivé par fortune de mer.* The insurers are not liable for a loss by any inherent defects of the article insured. *Les assureurs ne sont pas responsables des dommages qui procèdent du vice propre de la chose, et de sa nature intrinsèque. Ord. d'Amsterdam, article 27. Le Guidon, art. 8, c. 5. Ord. de la Mar., art. 29. Code de Commerce, art. 352. Boulay Paty, tome 4, p. 78.* And the French writers have held that the insurers are not liable for the loss of negroes who have killed themselves from despair, for this happens from the nature or the vice of the thing, or sometimes from the negligence of the master, and cannot be

imputed to the insurer, unless he has expressly charged himself with the risk.—*Pothier des Assur.*, n. 66. *Valin sur l'art. 11, tit. des Ass. Emerigon*, ch. 12, § 10. Nor when negroes are killed to suppress a revolt on board of the ship.—*M. Estrangin sur Pothier*, n. 66. *Boulay Paty*, tome 4, p. 82. But in a case where the principal officers of the ship had died, and the crew were so diminished and weakened by a contagious disease as not to be able to attend to the ordinary duties of the ship, nor to prevent a revolt, the insurers were held liable, and the loss attributed to the malady as being *causa causantia*, and within the policy.—*Boulay Paty*, tome 4, p. 83.

WHEN THE POLICY ATTACHES AND TERMINATES.

1. Upon what does the commencement and termination of the risk essentially depend?

Upon the words of the policy. The policy is to be construed liberally for the benefit of the insured, and with a due regard to its design and object, as a contract of indemnity.—*Cowp.* 585. 9 *East*, 81. 10 *Id.* 344. 1 *Burr*, 348. 3 *East*, 579.

The policy may be on a voyage *out*, or on a voyage *in*, or on the whole complex voyage *out and in*: or it may be *for part* of the route, or for a limited *time*, or from *port to port*, in an intermediate stage of the voyage. If insurance on a ship be *from* such a place, the risk does not commence until the vessel breaks aground. If *at and from*, it then includes all the time the ship is in port after the policy is subscribed, if the ship be at home; and if abroad, it commences, according to the decision in *Pennsylvania*, only from the time she has been safely moored twenty-four hours after her arrival.—*Garrigues v. Cox*, 1 *Binn. Rep.* 592. In *Pittagrew v. Fringle*, 3 *Barn. & Ald.* 514, the general principle was admitted to be, that if the ship *quits her moorings* and removes, though only to a short distance, being perfectly ready to proceed on her voyage, it is a *sailing on the voyage*, though she be detained by some subsequent occurrence.—3 *Kent*, 307. *Parmenter v. Cousins*, 2 *Camp. Rep.* 235. *Zacharie v. Orleans Ins. Co.*, 5 *Martin's N. S. R.* 637. *Williamson v. Innes*, 8 *Bing.* 79. *Taylor v. Lowell*, 3 *Mass. Rep.* 331. *Merchants' Ins. Co. v. Clapp*, 11 *Pick.* 56. *Tasker v. Cunningham*, 1 *Bligh.* 87. *Lockyer v. Offley*, 1 *T. R.* 252. *Peters v. Phoenix Ins. Co.*, 3 *S. & R.* 25.

If a ship be expected to arrive at a foreign port, and be insured “at and from that place,” or from her arrival there, other cases say the risk attaches from her first arrival.—*Mottaue v. London Ass. Co.*, 1 *Atk. Rep.* 548. *Condry's Marsh.* 261. 2 *Caines' Cases*, 172.

2. By what is an ambiguity in the description of the place, at which a risk is to commence, to be construed?

By the known usage and understanding of the trade, if a known usage exist. Thus in the case of a policy from India and the East India Islands, evidence is admissible to show that *Mauritius* is considered in

mercantile language as an Indian island, although, according to its natural geography, it would more properly be considered as belonging to Africa.—*Robertson v. Clarke*, 1 *Bing.* 445. The evidence of this usage was not sufficient on the first trial, but prevailed on the second.—*Id.* 451, and see 3 *Camp.* 200, 5 *B. & Ald.* 238, *Infra* as to duration of risks and goods, &c. And so in the case of an insurance from a port in this country the designation of the *terminus à quo*, is to be understood, in its usual or popular acceptance, rather than in that which is precisely and technically correct. Thus if a policy describe the adventure, as at and from Lyme, Lyme being the head of a port comprehending an extensive district of coast, the policy is understood to relate to the town of Lyme.—*Payne v. Hutchinson*, 2 *Taunt.* 405. *Constable v. Noble*, 2 *Taunt.* 403, 405. 15 *East*, 304.

A policy at and from London to all ports and places on this side and on the other side of the Cape of Good Hope, forwards and backwards, at sea, at all times, on all services, in all ports and places, until the ship's safe arrival back again at her last station of discharge, is sufficiently extensive to protect successive cargoes of goods, laden in the course of her trade to and at the East Indies.—*Grant v. Delacour*, 1 *Taunt.* 466.

The place at which the risk will terminate in the case of a policy on goods, depends upon the nature of the trade, and the terms in which the policy is expressed.—*Richardson v. The London Ass. Co.*, 4 *Camp.* 94. 3 *Camp.* 437. *Parkinson v. Collier*, *Park.* 170. *Leigh v. Matther*, 1 *Esp. Rep.* 412. *Park Ins.* 64. *Marsh. Ins.*, 1 *Burr.* 348. *Noble v. Kennoway*, *Dougl.* 492. 1 *Taunt.* 248. 7 *Taunt.* 270.

Where the usage is for the ship to proceed to an adjoining port and there tranship the goods in shallops, the underwriters are liable for a loss which happens to them after such transhipment, without any communication to them of the course of trade.—*Stewart v. Belle*, 5 *Barn. & Ald.* 238. *Matthie et al. v. Polls*, 3 *B. & Pull.* 23. 3 *Taunt.* 291. 2 *Strange*, 1236. 2 *Boss. & Pull.* 430. 3 *Esp.* 289. 3 *Taunt.* 291. *Tierney v. Etherington*, 1 *Burr.* 340. 1 *New R.* 19.

3. What construction is to be put upon a policy "at and from an island?"

A policy on a vessel "at and from an island," protects her in sailing from port to port of the island to take in cargo.

An insurance to an island may terminate at the first port, and the expression may be adopted from the uncertainty at what port the vessel may first arrive; but it seems difficult to put any other construction on an insurance "at and from an island," or to assign any other motive for the risk being so described, than that it is a license to use the different ports of the island for the purpose of obtaining a return cargo.—*Dicky v. Baltimore Ins. Co.*, *Cranch*, 327.

DEVIATION.

1. What is deviation as understood in a policy of insurance?

It is where a ship insured for a certain voyage, sails on a different voyage, or, in other words, when the *terminus à quo* or the *terminus ad quem* of the voyage for which the ship is destined, and on which she sails, is different from that specified in the policy for the commencement or the conclusion of the risk.—*Woolbridge v. Boydell*, Dougl. 16. 2 T. R. 30. 2 H. Bla. 347. 4 T. R. 36. 5 Barn. & Cres. 210, 214. *La Gydon*, art. 12, c. 9. *Ord. de la mar.* art. 36. *Code de Commerce*, art. 364, 351. *Observations du tribunal de commerce de Nantes*, tome 2, 2 Part, pag. 145. *Observations du tribunal de commerce de Rennes*, *ibid.* pag. 350.

2. What is the legal effect of a deviation?

It entirely vitiates the contract. Thus when a ship was insured from Maryland to Cadiz, but the vessel cleared for Falmouth, the exportation bond being given for Falmouth, and the bills of lading for Falmouth and a market, the underwriters were held not liable, although the ship was lost in a track which would have applied equally to Falmouth or to Cadiz, and before the dividing point of the two voyages.—*Woolbridge v. Boydell*, Dougl. 16. *Boulay Paty*, tome 4, p. 177. In the case of an unjustifiable deviation, the insurer is discharged; not indeed from loss occurring previous to the deviation but from all subsequent losses.—3 Kent, 312. *Roccus de Ass. n.* 20, and 52. *Emerigon*, tome 2, 28, 59, 60. 9 Mass. Rep. 447. *Condy's Marshall*, 184, 185. 1 Phillips on Insurance, 181. *Fox v. Black & Townson v. Guyon*, cited in *Boawes*, v. 1, 306. 9 Mass. Rep. 449. *Marlin v. Delaware Ins. Co.*, 2 Wash. C. C. Rep. 254. This doctrine is very strictly taken.—*Elliot v. Wilson*, 7 Bro. P. C. 459. *Valin sur l'art. 37. Titre des Assur. de l'Ord.* *Hammond v. Read*, 4 B. & A. 72. *Solly v. Whitmore*, 5 *Ibid.*, 45. 4 Taunt. 519. *Hibbert et al. v. Phyn*, 1 T. Rep. 25. 4 Camp. 150. *Fox v. Black*, Bea. 315. *Townson v. Guyon*, *id.* *Salisbury v. Townson*, Park, 454. 1 Burr. 341. *Williams v. Shea*, 3 Camp. 469. *Redman v. Loudon*, 3 Camp. 503. 5 Taunt. 462. 1 *Marshall's Rep.* 136, 4 Esp. 25. *Johnson v. Broadfoot*, cited *Cowp.* 151. 4 T. R. 33. *Middlewood v. Blakes*, 7 T. R. 162, 169. 1 M. & S. 46, 51, 52. 1 Bro. P. C. 470.

3. In what cases may voluntary deviations be justified?

Stopping, or going out of the way to relieve a vessel in distress, or to save lives, or goods, may perhaps, under certain circumstances, not be considered as a deviation which discharges the insurer.—6 East, 54. Judge Peters observed that such deviation was justified to the heart on principles of humanity, but not to the law.—1 *Peters' Adm. Rep.* 40, 64, 2 *Ibid.*, 378. *Bond v. The Brig Corn*, 2 Wash. C. C. Rep. 80. This distinction was sustained by Mr. Justice Story in the case of *Foster v. Gardner*, *Amr. Jurist*, No. 21, and in the case of the *Henry Ewbank*, *ibid.*, 23,

p. 86, and he agreed that any stoppage on the high seas, except for the purpose of saving life, would be a deviation, and discharge the underwriter.

4. What effect is given to the word *touch*, or to the words *touch and stay*, at an intermediate port on the passage?

If there be liberty granted by the policy to *touch*, or to *touch and stay*, at an intermediate port on the passage, the better opinion now is, that the insured may trade there, when consistent with the object, and the furtherance of the adventure, by breaking bulk, or by discharging and taking in cargo, provided it produces no unnecessary delay, nor enhances nor varies the risk.—*Raine v. Bell*, 9 *East's R.* 195. *Cormack v. Gladstone*, 11 *Ibid.* 347. *Laroche v. Oswin*, 12 *Ibid.* 131. *Urquhart v. Barnard*, 1 *Taunt. Rep.* 450. *Cane v. Columbian Insurance Company*, 2 *Johns. R.* 264. *Hughes v. Union Ins. Co.*, 3 *Wheat. R.* 159. *Thorn-dike v. Boardman*, 4 *Pick. R.* 471. *Chase v. Eagle Ins. Co.*, 5 *Ibid.* 51. This liberal construction is also given to the phrase, liberty to *touch and make port freely*, contained in the French policies, and if new goods be taken in at such stopping port, the policy on cargo attaches on them as a substitute for the others. If the policy be on cargo to such an amount, and the ship discharges part of her cargo at the stopping port, but reserves sufficient on board as aliment for the policy, and pursues the voyage, the policy attaches on the *residuum* of the cargo.—*Emerigon*, tome 2, c. 13, § 8. *Boulay Paty, Cours Droit Com.* tome 4, 140, 147.

5. What course is the master bound to pursue when there are several ports of discharge mentioned in the policy?

If he goes to more than one, he must go to them in the order in which they are named in the policy, or if they be not specifically named he must generally go to them in the geographical order in which they occur, though there may be cases in which he need not follow the geographical order.—*Beatson v. Haworth*, 6 *T. R.* 531. *Marsden v. Reid*, 3 *East's Rep.* 572. *Clason v. Simonds*, cited in 6 *Term Rep.* 533. *Kane v. Col. Ins. Co.*, 1 *Johns. R.* 264. *Metcalf v. Parry*, 4 *Camp. N. P. Rep.* 123. *Houston v. New England Ins. Co.*, 5 *Pick. Rep.* 89.

6. How is a liberty to *touch and stay*, and *trade*, to be construed?

It was always construed to be subordinate to the voyage insured and to the usual course of that voyage, and for purposes connected with it. It does not extend to ports and places opposite to, or wide of, the usual course, or wholly unconnected with the voyage insured. This principle is as old as the law of insurance, and has accompanied it in every stage of its progress.—*Straccha, Gloss.* 14. *Casa-Regis Disc.* 67, n. 23, and *Disc.* 134. *Valin*, tome 2, 78, 79. *Emerigon*, tome 2, ch. 13, § 6, & *passim*. *Glassom v. Simons*, 5 *Term R.* 533, note. *Gardner v. Slewhouse*, 3 *Taunt. Rep.* 16. *Langhorn v. Allnuti*, 4 *Ibid.* 511. *Hammond v. Reed*, 4 *Barn. & Ald.* 62. *Lolly v. Whitmore*, 5 *ibid.* 45. *Bottomly v. Bovill*, 5 *Barnw. & Cres.* 210. *Rankin v. Reave*, *Park on Insurance*, 7th edit. 445. As where a policy was effected from C to D on a representation (not a war-

ranty) that the ship was to sail first from A to B and from B to C, the voyage was held to be protected by the policy, although after the ship had gone from A to B the journey from B to C was prevented, and the ship having returned back to A, proceeded immediately from thence to the port of C instead of proceeding from B to C. The ship here was lost while proceeding from C to D, and was consequently under the protection of the policy at the time; the representation, which was entirely executory, was correct at the time when it was made, and there was no default on the part of the insured.—*Driscoll v. Passmore*, 1 *Boss. & Pull*, 200. *Salk*, 445, *Com. Dig. Merchant*, E. 9. *Stewart v. Bell*, 5 *B. & A.* 238. Where the intention is to deviate, and the loss happens before the vessel arrives at the dividing points, the insurers are liable.—*Lawrence v. The Ocean Ins. Co.*, 11 *Johns. N. Y. Rep.* 241. *Silva v. Low*, 1 *Johns. N. Y. Cas.* 184. *Henshaw v. The Marine Ins. Co.*, 2 *Caines' N. Y. Rep.* 274. *Tucker v. Marine Ins. Co. of Alexandria*, 3 *Cranch's U. S. Rep.* 357. *Jarratt v. Ward*, 1 *Camp. N. P. Rep.* 263. *Smith v. Surridge*, 4 *Esp. N. P. Rep.* 26. *Oliver v. Maryland Ins. Co.*, 7 *Cranch, Rep.* 487. 9 *Mass. Rep.* 447. *Earl v. Shaw*, 1 *Johns. Cas.* 317. *Mount v. Larkins*, 8 *Bingham*, 108. *Freeman v. Taylor*, *ibid*, 124. *Grant v. King*, 4 *Esp. N. P. Rep.* 175. *Seamans v. Loring*, 1 *Mason*, 127.

7. What is the effect of a letter of marque upon a policy of insurance?

If the vessel have liberty to carry letters of marque, she may deviate for the purpose of defence, but not for the purpose of capture.—In *Haven v. Hollond*, 2 *Mason's Rep.* 230, a pretty enlarged discretion, and one carried to the very verge of the law, was confided to the captain, as to the best mode of defence, and it was held, that the letter of marque might chase and capture hostile vessels in sight in the course of the voyage, without its being a deviation; and if he captures the vessel the master may make the victory effectual, and man out the prize, and the delay for those purposes is not a deviation. If liberty be given her to *chase and capture*, that will not enable her to convoy her prize into port, though she may do it if she be not thereby led out of the way; and to cruise for six weeks means six consecutive weeks, and not at different times.—*Lawrence v. Sidebotham*, 6 *East's Rep.* 45. *Ward v. Wood*, 13 *Mass. Rep.* 539. *Syers v. Bridge*, *Doug. Rep.* 509. 2 *Smith*, 213. *Hibbert et al. v. Halling*, 2 *Taunt.*

Taking a prize on the voyage, though there be no chasing, is a deviation, although the vessel was commissioned and armed, and that known to the insurer.—*Wiggin et al. v. Boardman*, 14 *Mass. Rep.* 12 *S. C.* 13 *Mass. Rep.* 118. *Haven v. Hollond*, 2 *Mason's U. S. Rep.* 230. *Martin v. Delaware Ins. Co.* 2 *Wash. U. S. Rep.* 254. *Cruder v. Pennsylvania Ins. Co.*, 2 *Wash.* 339.

8. What is the distinction between an alteration of a voyage and a deviation?

The one is adopted previous to the commencement of the risk, and shows that the party had receded from his agreement, but the other takes place after the risk has commenced, and relates only to the execution of the original plan.—*Woolbridge v. Boydell*, *Douglass, Rep.* 16. *Kewly v.*

Ryan, 2 H. Black. Rep. 343. *Middlewood v. Blakes*, 7 Term Rep. 162. *Silva v. Low*, 1 Johns. Cas. 184. *Henshaw v. Marine Insurance Co.*, 2 Caines' R. 273. *Marine Ins. Co. v. Tucker*, 5 Cranch's R. 357. *Boulay Paty*, tome 4, p. 56, 57. *Casa-Regis*, disc. 67, n. 24. The foreign writers distinguish between the *voyage insured*, and the *voyage of the ship*. *Independer se habet assecuratio a viaggio navis*. If a ship sails on a voyage from Saint Malo to Toulon, and is insured from Saint Malo to Cadiz, the latter is the voyage insured, but the former is the voyage of the ship, and the voyage insured is known by its two extremes, or the *terminus à quo* and the *terminus ad quem*.—*Casa-Regis*, disc. 67, n. 4, p. 31. *Boulay Paty* tome 3, p. 416, 417. *Lawrence v. Ocean Ins. Co.*, 11 Johns. Rep. 241. S. C., 14 *Ibid*, 46. *Johnson J.*, in 3 Cranch's R. 385. 3 *Kent*, 317, 318.

9. What is the effect of taking on board more, or a different kind of cargo, than is authorized by the policy ?

It amounts to a deviation, and will discharge the insurer; and not because of any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance.—*Maryland Ins. Co. v. Le Roy, Bayard & McEvers*, 7 Cranch, 26. When the terms of the contract are departed from, the risks are ended and the premium acquired.—*Roccus*, note 20, *Boulay Paty*, tome 4, page 57.

The shortness of the time, or of the distance of the deviation, makes no difference as to its effect on the contract; if voluntary and without necessity, it is the substitution of another risk, and determines the contract.—3 *Kent's Com.* 312. *Fox v. Black*, *Townson v. Guyou*, cited *Beawes*, v. 1, 306. 9 *Mass. Rep.* 449. *Martin v. Delaware Ins. Co.*, 2 *Wash. Cir. Rep.* 254.

Any voluntary alteration of the course, or the voyage, immediately puts an end to the risks, and *Roccus*, No. 20, even holds that the voyage is changed, if the captain, before departure, take freight for another place. But this cannot be sustained, if the captain abandon his new project before the voyage is commenced.—*Boulay Paty*, tome 4, 57.

If goods insured, are transhipped without necessity into another vessel than the one intended by the policy, it is a deviation.—*Casa-Regis*, disc. 1, No. 29. *Luca de credito*, disc. 108, No. 6. *Leg. Rho. l.* 10. *Emerigon*, tome 1, § 4, p. 183, art. 1116 du *Code Civile Fran.* *Observations de la Cour de Cassation*, tome 1, p. 26. *Cujas sur. l. 4, ff. de legat.* *Pothier, Traité des Ass.*, No. 106. *Boulay Paty*, tome 3, p. 322.

10. What if the ship, after having deviated, returns to the proper course, and while pursuing that course, loss happens ?

The insurer will not be held responsible for the loss; for, by the act of deviation, the contract was completely dissolved. And this, though there is no particular course prescribed in the policy.—*Les lieux des risques une fois abandonnés par le déroutement volontaire, ne se retrouvent plus aux yeux de la loi: l'assurance ne reprend donc point son ancienne vertu, quoique la navire qui a volontairement dérouté ou entrepris un nouveau voyage, revienne sain et sauf dans la route du voyage assuré.* *Emerigon*,

chap. 13, § 16. *M. Estrangin sur Pothier, Assurances, No. 73.* It is no deviation to go out of the way to avoid danger, or when compelled by necessity.—*Graham et al. v. The Commercial Ins. Co.*, 11 *Johns. N. R.* 352. *Maryland Ins. Co. v. Le Roy et al.*, 7 *Cranch's U. S. Rep.* 26. *Maryland Ins. Co. v. Wood*, 6 *Cranch*, 29. Necessity alone can sanction a deviation in any case; and that deviation must be strictly commensurate with the *vis major* producing it.—*The Maryland Insurance Co. v. Le Roy et al.*, 7 *Cranch*, 26. *Marine Ins. Co. of Alexandria v. Stras.*, *Breed et al. v. Eaton*, 10 *Mass. Rep.* 21. *Byrne v. Louisiana State Ins. Co.*, 19 *Martin's Lou. Rep.* 126. *Clarke v. The United Fire & Marine Ins. Co. of Portland*, 7 *Mass. Rep.* 365. *Thorndike v. Boardman*, 4 *Pick. R.* 47. *Ellery v. New England Ins. Co.*, 8 *Pick. Mass. R.* 14.

11. Will mere delay amount to a deviation?

It will; and the length of time a vessel may wait to take in her cargo, without discharging the underwriters, does not depend on the usage of the trade.—*Oliver v. The Maryland Ins. Co.*, 7 *Cranch's Rep.* 487.

BARRATRY.

1. What is barratry, as understood in the English law?

It means fraudulent conduct on the part of the master, in his character of master, or of the mariners, to the injury of the owner, and without his consent, and it includes every breach of trust committed with dishonest views.—3 *Kent's Commentaries*, 304. *Abbott on Shipping*, 5th ed., 138. *Lewen v. Suasso*, *Postlethw.* 147. *Dixon v. Reid*, 5 *Barn. & Ald.* 597. *Roscoe v. Corson*, 8 *Taunt.* 684. *Moss et al. v. Byron*, 6 *Term R.* 379. *Earle v. Rowcroft*, 8 *East*, 126. 2 *Marsh.* 78. *Bohem et al. v. Coombe*, 2 *M. & S.* 172. *Hucks v. Thornton*, 1 *Holt*, 30. From the very definition of barratry, it cannot be committed by a master, who is owner for the voyage; because he cannot commit a fraud upon himself. But it may be committed against a person who is owner for the voyage, although he may not be the general owner of the ship. A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. Such is understood to have been the case of *Vallejo v. Wheeler*, *Cowp.* 143. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership.—*Marcadier v. The Chesapeake Insur. Company*, 8 *Cranch's U. S. Rep.* 39. *S. P. Hooe & Co. v. Groverman*, 1 *Cranch*, 214.

2. How is barratry defined in the French law?

It has a more comprehensive meaning in France than in the English courts, and comprehends not only actual frauds, but also acts of imprudence or negligence in either the master or mariners, *ces termes de "baraterie de patron" comprennent toutes les espèces, tant de dol que de simple imprudence, défaut de soins et impéritie, tant du patron que des gens de l'équipage.*—*Valin sur l'art. 28, titre des Assurances, et Pothier, Ibid, No. 65. Emerigon, tome 1 p. 365. Observations de la Cour de Rennes, tome 1 p. 352.*

The Italian jurists define barratry to be *non omnis navarchi culpa est barataria, sed solum tunc ea dicitur, quando committitur cum præexistenti ejus machinatione, et dolo præordinato ad casum.*—*Casa-Regis, disc. 1, No. 77; Targa, Chap. 74, etc.*

3. How is barratry defined in the courts of the United States?

The English rule is followed, and the English decisions are taken as authority, in deciding questions of barratry.—*The Patapsco Ins. Co., 3 Peters' S. C. Rep. 321*, in which case Mr. J. Johnson, after taking notice of the etymology of the term, proceeded to cite the English books, in order to determine its practical application, and after an examination of the cases cited below, says, that in order to constitute barratry, as understood in our policies, there must be fraud, a wilful misconduct of the master and mariners. In another place he says, barratry must be some breach of trust in the master *ex maleficio*, which means some wilful and injurious act.—*2 Camp. 149. 8 East, 126. 11 Peters, 268. 2 Phil. on Ins. 237. 2 Camp. 620. 1 Taunt. 227. 2 New R. 226. 4 Taunt. 226. Peake, 202. 1 Camp. 123. 2 Barn. & Ald. 72. 5 Barn. & Ald. 171. 7 Barn. & Cres. 217. 14 Common Law Rep. 33. 7 Barn. & Cres. 794. 14 Com. Law Rep.*

The trade with an enemy without leave of the owner, though it be intended for his benefit, or for a neutral to resist search, though his motive be to serve the owner, or for a letter of marque to cruise, and make a prize, though done for the benefit of the owner, if the ship be lost by reason of the acts, are all of them acts of barratry. So, sailing out of port in violation of an embargo, or without paying the port duties, or to go out of the regular course upon a smuggling expedition, or to be engaged in smuggling against the consent of the owner, are all of them acts of barratry, equally with more palpable and direct acts of violence and fraud, for they are wilful breaches of duty by the master, in his character of master, to the injury of the owners—*Stamma v. Brown, Str. Rep. 1173. Knight v. Cambridge, as cited by Lord Mansfield in Cowp. Rep. 153, and by Lord Ellenborough in 8 East's Rep. 135, 136. Vallejo v. Wheeler, Cowp. Rep. 143. Robertson v. Ewer, 1 Term Rep. 127. Haverlock v. Hancill, 3 Term Rep. 277. Mass. v. Byron, 6 Term Rep. 379. Phyn. v. Royal Exchange Assurance Co., 7 Term Rep. 505. Earll v. Rowcroft, 8 East Rep. 126. Hood v. Nesbitt, 2 Dallas' Rep. 137. Kendrick v. Delafield, 2 Caines' Rep. 67. Brown v. Union Ins. Co., 5 Day's Rep. 1. Cook v. Com. Ins. Co., 11 Johns. Rep. 40. Grim v. Phoenix Ins. Co., 13 Johns. Rep. 451. Wilcox v. Union Ins. Co., 2 Binns, Rep. 574. Millaudon v. N. Orleans Ins. Co., 11 Martin's Lou. Rep. 305.*

Heyman et al. v. Parish, 2 *Camp.* 149. *Goldsmith v. Whitmore*, 3 *Taunt.* 508. 6 *Id.* 375. 2 *Camp.* 149, 620. *Cowp.* 143, 156. 6 *Taunt.* 376-7, 378. 2 *Marsh.* 78. *Bohem et al. v. Coombe*, 2 *M. & S.* 172. *Hucks v. Thornton*, 1 *Holt*, 30. *Toulmin v. Ingliss*, 1 *Camp.* 411. *Toulmin v. Anderson*, 1 *Taunt.* 227. *Nutt v. Bourdieu*, 1 *T. R.* 323. *Seares v. Thornton*, 7 *Taunt.* 627, 634, 638. 1 *Moore*, 373. *Ross v. Hunter*, 4 *T. R.* 33. *Hughes on Insurance*, 246.

It is not necessary, in order to constitute barratry, that the master should derive, or even intend to derive any benefit from the act done. Hence where the master sailed out of port without paying the port duties, whereby the ship was forfeited, it was holden to be barratry.—*Knight v. Cambridge*, 8 *East*, 135, 136. *Kendrick v. Delafield*, *Caines' Rep.* 57. So where the master, without the consent or acknowledgment of his owner, load on board the vessel such goods as will subject her to confiscation, it is barratry.—*Suckley v. Delafield*, 2 *Caines' Rep.* 222.

An unlawful rescue, in violation of the duties of neutrality, is barratry. *Steinbeck v. Ogden*, 3 *Caines' Rep.* 1. *Browne v. Union Ins. Co.*, 5 *Day*, 1. But if the master proceed on a voyage different from that insured, for the benefit of his owner, whom he has informed of his intention and afterwards sells the vessel and embezzles the proceeds, it is not barratry.—*Thurston v. Columbia Ins. Co.*, 3 *J. R.* 257. *Hood v. Nesbit*, 2 *Dall. R.* 137. *Grim v. Phoenix Ins. Co.*, 18 *J. R.* 451. *Howel v. Cin. Ins. Co.*, 7 *Ohio*, 277.

A mere breach of contract on the part of the master does not constitute barratry.—*Stamma v. Brown*, 2 *Stra.* 1173. *Cowp.* 153. 6 *East*, 136, 137. *Piper v. Cope*, 1 *Campb.* 443.

4. May the mortgagor of a vessel commit barratry, where the mortgagee has not entered into possession?

He cannot. The consent of the mortgagor is sufficient to negative barratry.—*Lewis v. Snaps*, 1 *Postl.* 147. *Hobbs v. Harman*, 3 *Camb.* 94. *Bontflour v. Wilmer*, *Lond. Sit. after T. T.*, 21 *Geo.* 2d.

5. Can the act of a freighter under a general charter party be treated as barratry?

It cannot.—*Vallejo v. Wheeler*, *Cowp.* 143. *Lloft.* 63. *Soares v. Thornton*, 6 *Taunt.* 627. *Christie v. Lewis*, 2 *Brod. & Bing.* 444, 445. 1 *Moore*, 373. *James v. Jones*, 3 *Esp. Rep.* 27.

6. What effect has barratry upon a policy of insurance?

It will entirely vitiate a policy unless specially insured against.—3 *Kent's Com.* 304. We are told, *Roccus, de Ass. n.* 89, that barratry is expressly excepted in the policies at Naples. So by the ordinance of Philip II., for Antwerp, and by the usage of Rotterdam and Cadiz, barratry in the captain or mariners was not insurable. So by the *Ordonnance d'Anvers, art. 4*. On the other hand at Hamburg, and Genoa, and Bilbao, it might be insured against. *Emerigon, des Ass.*, tome 1, 366, 367.

Ord. de Bilbao, ch. 22, n. 19. In some of our American policies, the risk from barratry is qualified; it is "barratry of the master, (unless the assured be owner of the vessel,) and mariners."

7. Upon a policy covering a loss of barratry, and barratry is actually committed, and subsequent to the barratrous act a loss happens, will the insurers be liable?

They will, if the loss happen in the course of the voyage insured. But where the master was guilty of smuggling in the course of the voyage, but the ship was not seized till after she had been moored twenty-four hours in her port of discharge, which is the usual period embraced in the policy, the underwriters were not considered liable.—*Lockyer v. Offley*, 1 T. R. 252. So where the captain barratrously carry the ship out of her course, procure her to be condemned in a vice-admiralty court, and delivered to the purchaser, the loss arises upon this last event.—*Hibler et al. v. Martin*, 1 Campb. 538. *Hughes on Insur.* 353. This may be doubted in the United States, upon the principle of *The Columbia Ins. Co. v. Lawrence*, 2 Peters' S. C. Rep. 46. *Patapsco Ins. Co. v. Coulter*, 3 Ibid, 236. *Waters v. The Merchants' Louisville Ins. Co.*, 11 Ibid, 213. *Columbia Ins. Co. v. Lawrence*, 10 Ibid, 507. *Williams v. The Suffolk Ins. Co.*, 13 Ibid, 415. *Peters v. The Warren Ins. Co.*, 14 Ibid, 99. In all of which cases, it was held that whenever the thing insured becomes directly chargeable with any expense, contribution or loss, in consequence of a particular peril; the law treats that peril, for all practical purposes, as the proximate cause of the loss. This is also according to the French rule.—*Pothier, Traité des Ass.*, No. 49. *Emerigon, des Ass.*, ch. 12, § 14, p. 414—417.

TOTAL LOSS.

1. What is a total loss within the meaning of a policy of insurance?

It may arise either by the total destruction of the thing insured, or if it specifically remains, by such damage to it as renders it of little or no value. A loss is said to be total if the voyage be entirely lost or defeated, or not worth pursuing, and the projected adventure frustrated.—3 Kent, 318. *Cazalet v. Barbe*, 1 T. Rep. 187. *Mitchell v. Edie*, 1 T. R. 608. *Goss v. Withers*, 2 Burr. 683. *Miles v. Fletcher*, Doug. 231. *Hamilton v. Mendez*, Burr. 1198.

A capture of a neutral vessel as prize by a belligerent armed vessel, is a total loss under a policy of insurance, and the insured is entitled thereon to abandon.

A capture by one belligerent from another, constitutes in the technical sense of the word a total loss: and gives an immediate right to the assured to abandon to the insurers, although the vessel may be afterwards recaptured or restored.—*Rhineland v. The Insurance Co. of Pennsylvania*, 4 Cranch's Rep. 29.

2. What is the rule as to the quantum of damages that may constitute a technical total loss?

Damage to a vessel by any of the perils of the sea, on the voyage insured, which could not be repaired at the port to which such vessel proceeded after the injury, without an expenditure of money, to an amount exceeding half the value of the vessel, at that port after such repairs, constitutes a total loss.—*The Patapsco Ins. Co. v. Southgate*, 5 *Peters' S. C. Rep.* 604. *Smith v. Bell*, 2 *Caines' Ca. in Error*, 153. *Center v. Amer. Ins. Co.*, 7 *Cow.* 564. *Peele v. The Merchants' Ins. Co.*, 3 *Mason's Rep.* 28, 69, 72. 3 *Kent's Com.* 276. *Hayman v. Molton*, 5 *Esp.* 65. *Mills v. Fletcher*, *Doug.* 231. *Plantamour v. Staples*, 1 *D. & E.* 611. *Robertson v. Caruthers*, 3 *S. & L.* 479. *Idle v. The Royal Exchange Ass. Co.*, 4 *S. & L.* *Read v. Bonham*, 7 *S. & L.* 384. *Robertson v. Clarke*, 8 *S. & L.* 373. *Scull v. Riddle*, 2 *Wash. C. C. R.* 151. *Fontain v. The Phoenix Ins. Co.*, 11 *Johns.* 293. *Center v. The Am. Ins. Co.*, 7 *Cowen*, 564, 582. *Gordon v. Mass. Fire & Mar. Ins. Co.*, 2 *Pick.* 249. *Phillips on Insurance*, 408.

3. To what time does the value of the vessel relate?

The rule laid down in the books, is in general, that the value of the vessel, at the time of the accident, is the true basis of calculation; and if so, it necessarily follows, that it must be the value at the place where the accident occurs. The sale is not conclusive with respect to such value. The question is open for other evidence, if any suspicion of fraud or misconduct rests upon the transaction.—*Patapsco Ins. Co., Plaintiffs in Error v. John Southgate and Wright Southgate, Defendants in Error*, 5 *Peters' S. C. Rep.* 604.

The valuation in the policy, or the value at the home port, or in the general markets of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one half of the value of the vessel, or not. For the like reason, the ordinary deduction in case of a partial loss of "one third new for old," from the repairs, is equally inapplicable to cases of a technical total loss, by an injury exceeding one half of the value of the vessel.—*Bradlie v. The Maryland Ins. Co.*, 12 *Peters' S. C. Rep.* 378.

A technical total loss originates in the damages of a real total loss. The technical total loss is terminated by the decree of restitution, unless something subsequent to that decree could be shown to prove the continuance of the danger.—*Marshall v. The Del. Ins. Co.*, 4 *Cranch, Rep.* 202.

A policy upon a ship, is an insurance of the ship for the voyage, not an insurance on the ship and the voyage.

The underwriters undertake for the ability of the ship to perform the voyage; not that she shall perform it at all events.—*Alexander v. The Baltimore Ins. Co.*, 4 *Cranch, Rep.* 370.

ABANDONMENT.

1. What is abandonment, as understood in a policy of insurance?

An abandonment signifies a giving up to the underwriters of the thing insured, or such part of it as may remain, on a loss taking place.—2 *Burr.* 696.

2. What is necessary, in order to constitute a right to abandon?

To constitute a right to abandon, there must have existed a total loss, occasioned by one of the perils insured against; but this total loss may be real or legal. When the loss is real, a controversy can only respect the fact; but the circumstances that constitute a legal or technical loss, yet remain in many cases open for consideration.—*Rhineland v. The Insurance Co. of Pennsylvania*, 4 *Cranch's Rep.* 29.

The French law prescribes the following causes upon which abandonment may be made:—*Le cas de prise, de naufrage, d'échouement avec bris, d'innavigabilité par fortune de mer, d'arrêt d'une puissance étrangère, d'arrêt de la part du gouvernement, et de perte ou détérioration des objets assurés, si la détérioration ou la perte va au moins à trois quarts; le défaut de nouvelles du navire, dans les assurances pour le voyage entière, c'est-à-dire pour un tems illimité, et le défaut de nouvelles, dans les assurances pour un tems limité.* The time prescribed by the *Code de Com.*, after which abandonment may be made in case of default of news, is two years in long, and one year in ordinary voyages.—*Code de Com.*, art. 375.

3. Within what time after notice of the loss must abandonment be made?

Within a reasonable time; and what is a reasonable time must depend on circumstances, to be judged of by the jury. The insured may wait a reasonable time to ask for advice and information to enable him to decide whether he may legally abandon, and there may be other circumstances which may excuse some delay. But the delay must be *bona fide*, not with a view to speculate on events.—*Hustin v. The Phoenix Ins. Co.*, 1 *C. C. R.* 400, 430. *Mitchell v. Edie*, 1 *Term Rep.* 608. *Martin v. Crokatt*, 14 *East's R.* 465. *Hunt v. Royal Exchange Ass. Co.*, 5 *Maule & Selw.* 47. *Hudson v. Harrison*, 3 *Brod. & Bing.* 97. The insurer may take possession of a vessel stranded and abandoned to him, and repair her, provided he does it diligently, or in a reasonable time; and if he has not accepted the abandonment, and the repairs amount to less than half the value, he may restore the vessel.—*Peele v. Suffolk Ins. Co.*, 7 *Pick. R.* 254.

When the assured receive notice of a loss, it becomes incumbent on them to elect whether they will abandon or not; and if they intend to abandon, to give notice of such intention to the underwriters.—*Marine Ins. Co. v. Tucker*, 3 *Cranch*, 357. 1 *Cond. Rep.* 561. *Maryland Insurance Co. v. Ruden's Administrator*, 6 *Cranch*, 338. *Livingston et al. v. Maryland Ins. Co.* 7 *Ibid*, 506.

The right to abandon may be kept in suspense by mutual consent. Where the agreement to that effect contains no limitation as to time, it is at least to continue while the property remains in its then situation, unless sooner determined by one of the parties. The assured might still abandon, and the underwriter might, at any time, require the assured to elect immediately, whether to abandon or to waive the right so to do.—*The Maryland Ins. Co. v. Ruden's Administrator*, 6 *Cranch's Rep.* 338.

4. In what case does the right to abandon for a technical total loss, in case of a policy on a ship, exist?

The right to abandon exists whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship on the voyage, is for the present gone from the control of the owner, and the time when she will be restored to him, in a state to resume the voyage, is uncertain or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage. In such cases the law deems the ship, though having physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost.—*Peele v. The Merchants' Ins. Co.*, 3 *Mason's Rep.* 96. *Sufficit semel extitisse conditionem ad beneficium assecurati de amissione navis etiam quod postea sequeretur recuperatio; nam per talem recuperationem non poterit præjudicari assecurato.* *Roccus*, No. 66. *Church v. Bedient*, 1 *Caine's Cas. in Error*, 21. *Depau v. Ocean Ins. Co.*, 5 *Coven's Rep.* 63. *Dutilh v. Gatliff*, 4 *Dallas' Rep.* 446. *Marshall v. Delaware Ins. Co.*, 2 *Wash. Cir. Rep.* 54. *Rhineland v. Ins. Co. of Penn.*, 4 *Cranch's Rep.* 29. *Marshall v. Delaware Ins. Co.*, *Ibid.*, 202. *Lee v. Boardman*, 3 *Mass. R.* 238. *Wood v. L. & K. Ins. Co.*, 6 *Ibid.*, 479. *Adams v. Delaware Ins. Co.*, 3 *Binn. Rep.* 287. *Peele v. Merchants' Ins. Co.*, 3 *Mason's R.* 27. *Maryland & Ph. Ins. Co. v. Bathurst*, 5 *Gill & Johns.* 159.

The right of abandonment does not depend upon the certainty, but upon the high probability of a total loss, either of the property or voyage, or both.

The right to abandon must necessarily depend upon the amount, and not on the cause of the loss. In the case of a loss arising from the perils of the sea, capture, seizure, and detention of princes, barratry, or any other peril embraced by the policy, if the loss be in effect total; as if the damage done to a ship be such that she cannot be repaired at all, or without incurring expenses equal to or greater than her value.—*Cambridge v. Anderson*, 1 *Ry. & M.* 60. 2 *B. & C.* 691. 1 *Bing.* 443. *Thornely et al. v. Hebson*, 2 *B. & Ald.* 513, 518, 519. A technical total loss must continue to the time of abandonment; not that it then should be known to exist, but that it should then actually exist.—*Olivera v. Union Ins. Co.*, 3 *Wheat.* 103. *Emerigon*, tome 2, 194–197. *Pothier des Ass.*, n. 131, 138. *Gardner v. Smith*, 1 *Johns. Cas.* 141. *Abbot v. Broome*, 1 *Caines' R.* 292. *Union Ins. Co. v. Robinson*, 2 *Ibid.*, 280. *Lee v. Boardman*, 3 *Mass. R.* 283. *Marine Ins. Co. v. Tucker*, 3 *Cranch's R.* 357. *Chesapeake Ins. Co. v. Stark*, 6 *Ibid.*, 268. *Peele v. Merchants' Ins. Co.*, 3 *Mason's R.* 27. Submersion is not *per se* a total loss of a vessel. It will depend upon circumstances whether it be or be not a total loss.—*Sewall v.*

U. States Insurance Co., 11 *Pick. Rep.* 90. When the insurance is on the ship there never can be a total loss, unless at the time of abandonment the ship was absolutely lost to the owner, as by capture or detention; or she was in such a state that the expense of making her available would exceed her value.—*Valin's Com.*, tome 2, 101. *Pothier des Ass.*, n. 121. *Goss v. Withers*, 2 *Burr. Rep.* 683. *Gardner v. Smith*, 1 *Johns. Cas.* 141. *Dicky v. N. Y. Ins. Co.*, 4 *Cowen's Rep.* 222. *Mercardia v. Chesapeake Ins. Co.*, 9 *Cranch's Rep.* 39. *Ludlow v. Columbia Ins. Co.*, 1 *Johns. R.* 335. *Peters v. Phoenix Ins. Co.*, 3 *Serg. & Rawle*, 25. *Wood v. L. & K. Ins. Co.*, 6 *Mass. Rep.* 479. *Story, J.*, 3 *Mason's Rep.* 69. The loss must exceed one half of the goods insured, or the gross amount paid for them.—*Rudd v. Union Ins. Co.* 4 *McCord's Rep.* 1. A detention by an embargo laid by the American government, of which both parties are citizens, after the policy of insurance attached, is a peril within the description of arrest, restraint, and detention of princes, &c., and a sufficient ground of abandonment.—*Odlyn v. Pennsylvania Ins. Co.*, 2 *Wash. C. C. R.* 312. 2 *Cond. Marsh. on Ins.* 508. 2 *Hall's Am. L. Journal*, 221. *Dixon v. Reid*, 5 *Barn. & Ald.* 597. *Brotherson v. Barber*, 5 *M. & Selw.* 417. *McIver v. Henderson*, 5 *Maule & Selw.* 576. 5 *Maule & Selw.* 445, 452.

5. In a policy on goods, by what rule is the "one half value" to be ascertained?

The rule in that case is, to ascertain the amount of injury by the difference between the gross proceeds of the sound and damaged goods.—*Johnson v. Sheddan*, 2 *East's Rep.* 581. 3 *Kent*, 330.

M. Boulay Paty lays down the rule as follows: instancing a cargo of corn; *de manière donc qu'ils établiront, pour première base, la valeur du grain au lieu et au tems du chargement, et la fixeront à telle somme; ils considèreront ensuite le grain avarié qui leur est présenté, et déclareront combien du grain en cet état aurait valu dans le même lieu et dans le même tems, comparativement à celui non avarié, qu'ils ont fixé à telle somme. Alors, si, par le résultat de cette comparaison, la cargaison est réduite au quart de ce qu'elle vaudrait si le grain n'avait aucunement souffert, il y a lieu au délaissement; dans le cas contraire, c'est-à-dire si la détérioration ne va pas au moins à trois quarts, il n'y a lieu qu'à l'action de avarie*, tome 4, p. 251.

6. What is the rule, where a part only, of the goods insured, are damaged above a moiety?

If the insurance be upon different kinds of goods indiscriminately, or as one entire parcel, it is then an insurance upon an integral subject, and an abandonment of part only cannot be made. But if the articles be separately specified and valued, it has been considered so far in the nature of a distinct insurance on each parcel, that the insured was allowed to recover as for a total loss of the damaged parcel, when damaged above a moiety in value.—*Guerlain v. Columbian Ins. Co.*, 7 *Johns. Rep.* 527. *Deidericks v. Com. Ins. Co.*, 10 *Ibid.*, 234. *Condy's Marshall*, 600. 1 *Phillips on Insurance*, 434, 435. *Valin*, tome 2, 108. *Pothier, h. t. No.*

151, 131, 132. *Emerigon*, tome 2, 214. *Le Guidon*, ch. 7, sec. 8, 9. In *Seton v. Delaware Ins. Co.* 2 Wash. Cir. Rep. 175, it was held that a partial loss of an entire cargo, by sea damage, if amounting to more than half, might, under circumstances, be converted into a technical total loss: but not if a *distinct part of the cargo* be destroyed, and the voyage be not thereby broken up.

Where a moiety of any portion specifically insured, has been lost, its owner may abandon, however small the proportion may be, to the whole cargo.—*Moses et al. v. The Columbian Ins. Co.*, 6 Johns. Rep. 219. *Vandenheuvel v. United Ins. Co.*, 1 Johns. Rep. 411.

7. Is mere fear a just cause of abandonment?

The fear of loss is not itself a just cause for abandonment. To justify abandonment upon that ground there must be a just fear amounting to a *vis major*, illustrated by the fear of being made a slave, or a prisoner, or perishing in case of extremity, or where the defence becomes impossible.—*Massonnier v. The Union Ins. Co. of Charleston*, 1 Nott & Mc Cord's S. Ca. R. 155. *Craig v. United Ins. Co.*, 6 Johns. N. Y. R. 250. *Amory v. Jones*, 6 Mass. Rep. 321. *Smith v. The Universal Ins. Co.*, 6 Wheat. U. S. Rep. 176. *Brewer v. Union Ins. Co.*, 12 Mass. Rep. 170. *Richardson et al. v. The Marine Fire & Marine Ins. Co.* 6 Mass. Rep., 102.

8. What is the effect of a sale by the master, *bona fide*, made for the benefit of all concerned, of a ship and cargo?

The underwriters are liable for the loss provided the sale was a matter of necessity.—*Jale v. Royal Exchange Ass. Co.*, policy on freights, 8 Taunt. 755. 3 Moore, 115. S. C. in C. P. 3 Bro. & Bing. 151 n. a. S. C. in *Error King's Bench*, where the court granted a *venue de novo*, on the ground that the necessity was not expressly found by the special verdict, but the case did not come on to be tried again, having been settled.—*Read v. Bonham*, 3 Bro. & Bing. 147. *Meburne v. Lecky*, C. P. 5 March, 1820. 4 Dowling & Ryland, 207. *Cambridge v. Anderton*, 2 B. & C. 691. *Robertson v. Clarke*, 1 Bing. 445, 450. 2 Barn. & Ald. 218, 219. *Underwood v. Robinson*, 4 Campb. 138. *Parmeter v. Todhunter*, 1 Campb. 654. The above cases relating to sale were questions between the insurer and insured. Cases between the owner of ships or goods, and the purchaser through the master thereof, or between the owner of the goods and the ship-owner or master, where perhaps the rule holds most strictly that only necessity and not the master's view of prudence or expediency will justify a sale, are *Van Omerda v. Dwick*, 2 Campb. 42. *Joseph et al. v. Knox*, 3 Campb. 322. *Wilson v. Miller et al.*, 2 Stark. 1 2 B. & Ald. 4. *Reid v. Darby*, 10 East. 143. *Hunter v. Prinsep*, *Idem*, 378. *Hayman et al. v. Molton*, 5 Esp. 64. *Abbott*, 8. *Andrews v. Glover*, *Id.* 11. *Freeman et al. v. East India Company*, 5 Barn. & Ald. 617. *Canan et al. v. Meburne et al.*, 1 Bing. 242. *Morris et al. v. Robinson*, 3 Barn. & Cres. 196. And see 1 Rob. A. R. 14, 292. 3 *Idem*, 240. *Edw.* 117. *Tremenheere v. Tresilian*, 1 Siderfin, 452. *Cambridge v. Anderton*, 1 R. & M. 60, 62. 2 B. & C. 691. 4 D. & R. 203. *Robert-*

son v. Clark, 1 *Bing*. 445. *C. P. etiam. Read v. Bonham*, 3 *Bro. & B.* 147. 1 *Stark.* 498. 2 *Id.* 571. *Gernon v. Royal Exchange Ass. Co.*, 1 *Holt*, 49. 2 *Marsh.* 88. 6 *Taunt.* 383. *Id.* 384. Where this rule is said to have been always adopted by *Gibbs, C. J.* The policy was on sugar warranted free from a particular average; and the rule *nisi* for a new trial was confined to the point whether the notice was in time, and not extended to the question whether the loss was merely partial. But see as to the warranty free from particular average.—16 *East*, 214. 2 *M. & S.* 240. 341. 7 *Taunt.* 154. 12 *East*, 559. *Freeman v. East India Company*, 5 *B. & Ald.* 621, 623. And see *M. & S.* 45, 55, 56, 57. *Morris v. Rob.* 3 *B. & C.* 204, *Pr. Bailey, J. Miles v. Fletcher, Doug.* 220, 231. *Acc. per Lord Mansfield & Buller, J. Plantamour v. Staples*, 1 *T. Rep.* 611, 612. *Idle v. Royal Exchange Ass. Co.*, 8 *Taunt.* 775. *Per Dallas, Ch. J.* 3 *Bro. & Bing.* 151. *N. S. C. Id.* 153, 154; but *semb.* that the sale must be necessary.—4 *Campb.* 138. 2 *Stark.* 3. 5 *Barn. & A.* 617. 3 *B. & C.* 196. However, with regard to the power of the master to sell the ship or cargo, or a part thereof, in a foreign port, it may be remarked that the master's authority to bind the ship-owner or merchant by a sale, is limited in a case of necessity, which supersedes the ordinary rules of law. His authority as master confers upon him no dominion or proprietary interest over the things intrusted to his care; he is bound to carry them forward to their place of destination.—*Reid v. Darby*, 10 *East*, 143. 3 *Rob. A. R.* 258. *Fanny v. Elleura*, 1 *Edw. A. R.* 117. 3 *Bro. & B.* 151, *n.* 5 *B. & A.* 617. 3 *B. & C.* 196. The sale of the vessel may be justifiable in a case of extreme urgency; but the sale must be conducted *optima fide*: and it is sufficient to throw a suspicion on the transaction that one of the surveyors employed became a sub-purchaser.—*Hayman v. Molton*, 5 *Esp.* 65. *Abbott on Shipp.* 5th ed. 243. *Wilson v. Millar, Stark.* 1. And the ship-owners were liable to the extent of the value of the ship and its appurtenances.—2 *B. & A.* 2.

9. What is the rule as to the authority of a vice-admiralty court to decree the sale of a ship?

That a vice-admiralty court abroad has no authority upon the petition of the captain of a ship bound on a foreign voyage, to decree the sale of the ship, though reported upon a survey to be unseaworthy and incapable of repair, so as to carry the cargo to its place of destination, without an expense exceeding the value of the ship when repaired.—*Reid v. Darby*, 10 *East*, 143. Nor does a purchaser of a ship or goods from the master, in a foreign port, acquire any title to them by reason of the sale having taken place under the decree of the vice-admiralty court.—*Morris v. Robinson*, 3 *B. & C.* 196. *Canan et al. v. Meaburn*, 1 *Bing.* 243.

10. What is the rule as to the captain's obligation to tranship cargo, in case of innavigability of the ship?

The English rule undoubtedly is, that if there be another vessel in the same or in a contiguous port, which can be had, the duty is clear and

imperative upon the master to hire it; but still the master is to exercise a sound discretion adapted to the case.—*Mumford v. The Commercial Ins. Co.*, 6 *Johns. Rep.* 262. *Searle v. Scovell*, 4 *Johns. Ch. Rep.* 218. *Lord Ellenbor.* 10 *East's Rep.* 393. *Herbert v. Hallet*, 3 *Johns. Cas.* 93. *Clarke v. Mass. F. & M. Ins. Co.*, 2 *Pick.* 104. *Hunt v. Royal Ex. Ass. Co.* 5 *M. & S.* 47. *Saltus v. Ocean Ins. Co.*, 12 *Johns. Rep.* 107. *Tredwell v. Union Ins. Co.*, 6 *Cowen's Rep.* 270. 8 *Kent's Com.* 321. *Roccus*, n. 40, 55. *Dale v. Hall*, 1 *Wils. Rep.* 288. *Vinnius*, note *ad Pekium*, 259. 1 *Emerigon*, 373. *Proprietors of the Trent Navigation v. Wood*, 3 *Esp. N. P. Rep.* 127. *Cheviott v. Brooks*, 1 *Johns. Rep.* 364. 3 *Kent*, 212, 213.

By the French law, the captain is bound to tranship the goods if it be possible for him to procure another vessel; and in case the goods are reshipped, the insurers remain liable until the goods are debarked at their place of destination, and are bound to reimburse the assured all the expenses of salvage, of transshipment, of storage, of re-embarkment, and of the increase of freight, if any there be, which may be paid to the vessel engaged to carry the goods.—*Boulay Paty*, tome 2, 406. *Code de Commerce*, art. 393.

If, in the course of the voyage, the ship should become unseaworthy, and require repairs, by reason of some accident; as by tempest, a combat with pirates, or an enemy, &c., and the captain elects to repair his ship, the freighter is bound to wait till that is accomplished, or to withdraw his goods, and pay the whole freight. And if in repairing the ship, it is necessary to unship the cargo, the expense of discharging and reshipping falls upon the shipper.—*Valin*, sur l'art. 11, titre du Fret, de l'ordonnance de la marine.

If the ship is in such condition as not to admit of being repaired (which must be determined by experts appointed for that purpose) the captain is bound to procure another ship. *Est obligé de louer incessamment un autre navire, et qu'il n'est dispensé de cette obligation formelle que dans le cas où il ne puisse pas en trouver.* Though this language seems positive, the French jurists of the first reputation are divided upon its construction; *Valin* and *Pothier* holding that it should be construed so as to invest the captain with a discretionary power in regard to the matter, and hold that the phrase "*sera tenu*" only meant to say, that if he would earn his entire freight he must send the goods forward to their place of destination, and cite in support of this position, *Vinnius sur Pekius instit. ad legem Rhodiam. Jugemens d'Oleron*, art. 4, b. *Ordonnance de Wisbuy*, art. 16 et 37, in which the same words are so understood. *Valin*, sur l'art. 11, et *Pothier*, *Charte partré*, No. 68. On the other hand, *Emerigon*, *Boulay Paty*, and the *Cour Royal de Caen*, contend for a strict construction, and say that if the new legislature had intended to adopt the construction of *Valin* and *Pothier*, they would have used the words "*Le Capitaine pourra*," instead of *Le Capitaine est tenu*. *Emerigon*, tome 1, p. 428, *déclaration de 1799*, article 7. *Observ. de tribunaux*, tome 2, p. 170. *Code de Commerce*, art. 296. *Code Civile*, art. 1147. *Boulay Paty*, tome 2, p. 404. This latter opinion is now, so far as I have the means of knowing, the received doctrine in the French tribunals.

11. What is the rule as to freight, upon the abandonment of the ship ?

It has been a very controverted question, whether an abandonment of the ship transferred the freight in whole or in part. It was finally settled in the jurisprudence of New York and Massachusetts, and adopted as the true rule in the Circuit Court of the United States for Massachusetts, that on an accepted abandonment of the ship, the freight earned previous to disaster was to be retained by the owner, or his representative, the insurer on the freight, and apportioned *pro rata itineris* : and that the freight subsequently to be earned went to the insurer on the ship.—*United Ins. Co. v. Lenox*, 1 Johns. Cas. 377. 2 *Ibid*, 443. *Davy v. Hallet*, 3 Carvins' Rep. 20. *Marine Ins. Co. v. United Ins. Co.*, 9 Johns. Rep. 186. *Coolidge v. Gloucester Marine Ins. Co.*, 4 Mason's Rep. 196.

So in the case of a mortgage of a ship whilst at sea, and possession taken under it, the accruing freight passed to the mortgagee, as incident to the ship.—*Dean v. McGhie*, 12 B. Moore, 185. In *5th Maule & Selw.*, affirmed in error, 2 Brod. & Bing. 379, the court did not make any distinction between the freight earned, as a *pro rata* freight, antecedent to the abandonment, and that earned afterwards, but the entire freight was held to pass with the transfer of the ship. There would seem, therefore, to be a variance on this point between the English and the American cases.

In 1778 it was settled in Marseilles, under the sanction of Emerigon, that freight was an accessory to the ship ; and in abandoning the ship, the freight acquired during the voyage went with it.—*Emerigon*, tome 2, p. 217, 227. *Valin*, Com. 3, tit. 6, des Assurances, art. 15. 3 *Kent*, 333.

12. What is understood by "stranding," in a policy ?

A stranding in the sense of the policy, is, when a ship takes ground, not in the ordinary course of navigation, but by accident, or force of wind or sea, and remains stationary for some time. The vessel must ground from an accident happening out of the usual course of navigation.—*Wells v. Hopwood*, 3 Barn. & Adolph. 2. But the cases make a stranding to depend so much upon special circumstances, and they make so many nice distinctions, that it is difficult to give any precise definition or rule, applicable to the subject.—3 *Kent's Com.* 323. *McDougal*, 2 *Royal Exchange Ass. Co.*, 4 Camp. 283. 4 *Maule v. Selw.* 503. *Rayner v. Goodland*, 5 Barn. & Ald. 225. *Burnet v. Kensington*, 1 *Esp. Rep.* 417. *Carruther v. Sydebotham*, 4 *Maule & Selw.* 77. *Barrow v. Bell*, 4 Barn. & Cresw. 736. *Bishop v. Pentland*, 7 Barn. & Cresw. 219. 1 *Manning & Ryland*, 49.

13. What is understood by the term "innavigability ?"

Innavigability, in the sense of the law of insurance, is when the vessel, by a peril of the sea, ceases to be navigable by irremedial misfortune : *in eum statum, qui providentia humana reparari non potest*. The ship is relatively innavigable, when it will require almost as much time and expense to repair her as to build a new one. 2 *Kent*, 323. *Targa*, ch. 54, p. 239, et ch. 60, 256. *Emerigon*, tome 1, 591, 598. *Casa-Regis*, Disc. 1, No. 142, etc. *Boulay Paty*, tome 4, p. 254. *Observations de la*

Cour d'appel de Rouen, tome 1, p. 276, et observations du tribunal de commerce du Havre, tome 2, 1 part, page 276.

The French writers distinguish shipwreck into four classes, *nauffrage*, *echouement avec brise absolu*, *echouement avec brise partial*, et *l'echouement simple*, which I understand to mean a total destruction of the ship by perils of the sea, a stranding with a total breaking up, a stranding and partial breaking up, and a stranding or taking ground without any material injury to the ship. As to the consequences of the first and second classes, there can be but very little difference, as regards a policy on the ship; and they, with the third, equally justify an abandonment under the French law.—*Emerigon*, tome 4, p. 404. *Boulay Paty*, tome 4, p. 230. By the *Code de Com.*, art. 389, if a stranded ship may be put in a condition to continue her voyage, no abandonment can take place; therefore, simple stranding can seldom give rise to abandonment. Innavigability may arise from other causes than wreck or stranding, or in fact, from any cause which may put the ship out of a condition to perform the voyage, upon which an abandonment may take place. But the innavigability must be determined by the local authority of the place where the accident occurs.

14. What is the rule of construction, where a policy is on a ship for the voyage, as relates to the right to abandon?

That if the ship be prevented by a peril within the policy from proceeding on her voyage, and be irreparably injured, and the voyage be thereby lost, it is a total loss of the ship, freight and cargo, provided no other ship can be procured to carry on the cargo.—*Condy's Marsh.* 585. A loss of the voyage, as to the cargo, is not a loss of the voyage as to the ship; for a policy on a ship, is an insurance of the ship for the voyage, and not an insurance on the ship and the voyage.—*Alexander v. Baltimore Ins. Co.*, 4 *Cranch's Rep.* 370. 1 *Mason's Rep.* 343. *Hadkinson v. Robinson*, 3 *Boss. & Pull.* 388. 1 *Johns. Cas.* 309. 1 *Dow's Rep.* 359. 2 *Ibid.* 477. 2 *Maulé & Selw.* 293. And on an insurance of a ship for a voyage, it is not sufficient to justify an abandonment, that the voyage be lost, if the ship remains safe.—*Pole v. Fitzgerald*, *Wils. Rep.* 641. 5 *Bro. P. C.* 137—142. The doctrine of the old cases, that the insured may abandon when the voyage is lost, is narrowed. Every such loss will not justify it. A retardation is not sufficient. If the profits be reduced one-half, it was said the owner was not bound to prosecute the voyage; but every case seems to rest upon its own circumstances.

15. What is the rule as to the right of the insured to elect whether he will abandon or repair the ship?

He may elect to repair the damage at the expense of the insurer, even if it amounts to the whole value of the ship; and, on the other hand, he is not obliged, against his consent, to take the remnants and surplusses of a last voyage.—*Humphreys v. Union Ins. Co.*, 3 *Mason*, 436. When a case proper for abandonment exists, and it be duly made, the underwriter cannot intercept the exercise of the right, and destroy its effect, by an offer to pay the amount of the repairs. In a case proper for abandonment the insured may stand upon his rights, uncontrolled by the underwriter,

for the opinion to abandon rests with him, and not with the other party. If, by his acts and interference, he shows that he intend to act as *owner*, and elects to repair, he loses his right to abandon, or it is a waiver of it if made.—*Dicky v. N. Y. Ins. Co.*, 4 *Coven*, 222, *S. C.* 3 *Wendell*, 658. *Columbia Ins. Co. v. Ashby*, 1 *Peters' U. S. Rep.* 139.

16. What is the effect of an abandonment legally made?

The English rule is, that an abandonment, though rightly made, is not absolute, but is liable to be controlled by subsequent events; and that if the loss has ceased to be total before action, the abandonment becomes inoperative.—*Bainbridge v. Neilson*, 10 *East's Rep.* 329. *Patterson v. Ritchie*, 4 *Maule & Selw.* 394. *Drake v. Maryatte*, 1 *Barn. & Cres.* 473. 2 *Dow & Ry.* 696. 4 *Maule & Selw.* 397. 2 *Dow, Rep.* 474. 5 *Maule & Selw.* 422. 1 *Stark*, 15. *Harson et al. v. Harrison*, 2 *Brod. & Bing.* 97. *Randall v. Cockrane*, 1 *Ves. Sen.* 98.

The English rule does not rest, however, without some distrust as to its solidity.—*Holdsworth v. Wise*, 7 *Barn. & Cres.* 794. It was there held, that if a ship has been once necessarily abandoned, the owners may recover for a total loss, though she is afterwards recovered and brought into port. This was coming to the true and sound doctrine on the subject.—See also, *Naylor v. Taylor*, 9 *Ibid.*, 718. 2 *Dow, Rep.* 474.

But in these United States a different rule prevails, and it is well settled in American jurisprudence, that an abandonment once rightfully made, is binding and conclusive between the parties, and the rights flowing from it become vested right, and are not to be divested by subsequent events.—3 *Kent's Com.* 324. *Mellon v. Bucks, et al.*, 17 *Mart. Lou. Rep.* 370. *Comegys et al. v. Vasse*, 1 *Peters' U. S. S. C. Rep.* 213. *Hammond v. The Essex Fire & Marine Ins. Co.*, 4 *Mason's U. S. Rep.* 196.

The American rule agrees with the ordinances of Continental Europe. By the *Ordinance of Amsterdam*, art. 8, an abandonment once legally made conveys the property to the insurer, and becomes definitive, without regard to subsequent events. So by *Le Guidon de la Mer*, art. 1 chap. 7. By French *Code de Com.*, art. 378, an abandonment once accepted, or adjudged to be rightly made, becomes irrevocable and cannot in any case be affected by subsequent events.—*Pothier, No.* 131—138. *Sovary parère* 60, ques. 3. And where there are different underwriters on different policies, the abandoned effects become invested in each in proportion to the sum by him underwritten, without any regard to the date of the policies.—*Code de Comm.*, art. 359. *Boulay Paty*, tome 4, 375.

If the abandonment be legal, it puts the underwriters completely in the place of the assured, and the agent of the assured becomes the agent of the underwriters.—*The Chesapeake Ins. Co. v. Starke*, 6 *Cranch, Rep.* 268. A formal instrument of cession is not essential to vest their property in the underwriter. The abandonment itself amounts to a legal transfer of the rights of the insured, so as to enable the underwriters to pursue the property as effectually as if a regular deed had been made to them. The refusal, therefore, to execute such a cession, will not affect a prior abandonment, which had been made and accepted.—*Hurtin v. The Phoenix Ins. Co.*, 1 *Wash. C. C. R.* 400, 530.

Upon a valid abandonment, the master becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them. It is the same thing with the consignee of the cargo.—*Somes v. Sugrue*, 4 Carr. & Payne, 275. *Patapsco Ins. Co. v. Southgate and others*.

17. What is necessary to constitute a valid abandonment?

There is some diversity of opinion among the elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment. It seems, however, agreed that no particular form is necessary, nor is it indispensable that it should be in writing. But in whatever mode or form it is made, it ought to be explicit, and not left open as a matter of inference for some equivocal acts. The assured must yield up to the underwriter, all his right, title, and interest, in the subject insured. For the abandonment, when properly made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, as far as it was covered by the policy.—3 *Marine Insurance*, 599. *Phillips on Insurance*, 447; and cases there cited. 5 *Peters' S. Ca. Rep.* 623. *Parameter v. Todhunter*, 1 *Campb.* 451. *Turner v. Edwards*, 12 *East*, 488. *Smith v. Bell*, 2 *Caines' Ca. in Error*, 153. *Centre v. American Ins. Co.*, 7 *Cow.* 564. *Peele v. The Merchants' Ins. Co.*, 3 *Mason's Rep.* 28, 69, 72. 3 *Kent's Com.* 329. *Storer v. Gray*, 2 *Mass.* 565. *Gorden v. Mass. Fire & Marine Ins. Co.*, 2 *Pick.* 249.

The assured must state the grounds of the abandonment, and the notice must be founded upon such facts as would sustain abandonment when made.—*Rosly v. The Chesapeake Ins. Co.*, 3 *Gill & Johns. Md. Rep.* 450. *Suydam et al. v. Marine Ins. Co.*, 1 *Johns. N. Y. Rep.* 181. *King v. Del. Ins. Co.*, 2 *Wash. U. S. C. C. Rep.* 309. *Livingston v. Maryland Ins. Co.*, 7 *Cranch U. S. Rep.* 536.

18. What is the rule as to the right to abandon memorandum articles?

That a loss of the voyage or the season, by perils of the sea, is not a ground for abandonment upon a policy on goods with a clause of warranty, free from average, &c., where the cargo is in safety, and not of such a perishable nature as to make the loss of voyage, a loss of the commodity, although the ship be rendered incapable of proceeding on the voyage.—*Hunt v. Royal Exchange Assurance Co.*, 5 *Maule & Selw.* 47. If the cargo be of a mixed character, no abandonment for mere deterioration of value, during the voyage, is valid, unless the damage on the non-memorandum articles exceeds a moiety of the whole cargo, including the memorandum articles.—*Morgan v. The United States Ins. Co.*, 1 *Wheat. Rep.* 224. In case of perishable articles within the memorandum, the insurer is secure against all damage to them, whether great or small, whether it defeats the voyage, or only diminishes the price of the goods, unless the articles be completely and actually destroyed, so as no longer physically to exist.—3 *Burr. Rep.* 1550. *Park on Ins.* 151, 25 *Geo.* 3. In some of our American policies, the exception in these words, "or the ship be stranded," is omitted.—*Park on Ins.* 151.

19. What is the rule as to the abandonment of freight?

That in case of a technical total loss of a vessel, if no freight, *pro rata*, is earned, or if the expense of sending on the cargo by another vessel will exceed a moiety of the freight agreed on by the charter party, it is a technical loss of freight which authorizes an abandonment of it.—*American Ins. Co. v. Carter*, 4 *Wend.* 45.

GENERAL AVERAGE.

1. What is understood in a policy of insurance by general average?

General, gross or extraordinary average, means a contribution made by all parties concerned, towards a loss sustained by some of the parties in interest, for the benefit of all, and it is called general, or gross average, because it falls upon the gross amount of the ship, cargo and freight. *Particular average* is the same as a partial loss, and it is to be borne by the parties immediately interested. *Primage and Average*, which are mentioned in bills of lading, mean a small compensation or duty paid to the master, over and above the freight, for his care and trouble as to the goods. It belongs to him of right, and it is not understood to be covered by the policy of insurance.—*Park on Ins.*, ch. 6, p. 134. *Best v. Saunders*, 1 *Dawson & Loyd*, 183.

2. From what causes may a claim for general average arise?

First, from a sacrifice deliberately made of the property of one of the parties concerned in the adventure, for the benefit of others; and whereby *his* loss is directly converted to *their* gain. *Nemo debet locupletari alienâ jacturâ*. Secondly, a claim may arise from expenses incurred, or services performed, by one party, (e. g. the ship-master), for the general benefit; and for this he has a right to claim a *recompense*.—*Dig. Leg. Rhod.*, art. 2 § 1. *Consol del Mar. For. Ord.*, *passim*, Q. *Van Weytsen*, *Tr. des Av.*, p. 5. *Domat Law Civ.* 1, 2, tit. 9. *Magens*, p. 55. *Wes-kett*, p. 130. *Pothier*, *Sur Cont. de L.*, n. 106. *Emerigon*, c. 12, § 39. *Kaimes' Pr. Eq.*, b. l. p. 1, c. 3. *Park*, 121. *Millar*, 335. *Marshall*, 536. *Benecke*, n. 90, &c. *Boulay Paty*, tome 4, p. 440.

3. What are the several causes that will support a claim for general average?

First, jettison. Second, damages done to the cargo, by cutting holes in the ship, or by opening the hatches for the purpose of effecting a jettison, or by getting the goods on deck to heave overboard. Third, damage done to the ship, by cutting holes to effect a jettison, or to let out the water. Fourth, cutting from, or slipping from anchors, to avoid running ashore, or on the rocks, or being run foul of by other ships, or when run foul of, for the purpose of getting clear. Fifth, cutting away the masts, sails, boats, &c., when the ship is in distress, and the general safety appears to require such sacrifices. Sixth, sails, ropes, and other material

cut and used at sea for the purpose of stopping a leak, or to rig juremasts, or for any purpose where the general safety appears to require the sacrifice. Seventh, loss on part of the cargo, obliged to be sold for the purpose of paying the expenses incurred in a foreign port, where the ship put in in distress, to enable her to proceed on her voyage. Eighth, freight of the goods, sold for the above purposes. Ninth, pilotage, on putting into a port in distress. Tenth, expenses of unloading the cargo, either for the purpose of repairing the ship, or for floating her when she accidentally gets aground. Eleventh, expenses of getting the ship off the ground. Twelfth, hire of extra hands to pump the ship, after her having sprung a leak. Thirteenth, all extra charges incurred for the general good, on putting into a foreign port in distress. Fourteenth, the sum awarded, or agreed to be paid to ships, boats, pilots, &c., for bringing a ship when at sea in distress, into port, or for unloading the ship and getting her off, when forced on shore. Also the charge of taking off anchors, cables, &c., and rendering assistance generally. Fifteenth, salvage to men-of-war, and to privateers for re-capture from the enemy, and charges thereon. Sixteenth, money or goods given by neutrals (as regards Great Britain) to an enemy, as a compensation to release the ship and the remainder of the cargo. Seventeenth, charges incurred in obtaining the release of a ship which had been unjustly detained.

Other subjects of average contribution may occur, such as,—loss of exchange on bills passed by the master on his owner for the disbursements, on putting into a foreign port in distress: maritime interest on bottomry bonds obliged to be given under similar circumstances: interest on advances: and in general it may be said that all extraordinary charges proceeding from endeavors to preserve the ship and cargo, and the damage or the loss resulting from the measures taken for that purpose, are fit subjects for contribution.

4. What is understood by a jettison?

A throwing overboard part of the cargo, or ship stores.—*Emerigon, c. 12, s. 39, 40. 1 Vol. 602, 605, &c. Jackson v. Charnock, 8 T. R. 513. Price v. Noble, 4 Taunt. 132.*

5. What is necessary to constitute a valid jettison?

It must be made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, and is laboring upon rocks or shallows, or is closely pursued by pirates or enemies; and then, if the ship, and the residue of the cargo, be saved by means of the sacrifice, nothing can be more reasonable than that the property saved should bear its proportion of the loss.—3 *Kent*, 233. *Laws of Oleron, art. 8; of Wisby, art. 20, 21, 28. Code de Com., art. 410.* Jettison may be made generally, in all cases where the ship is in distress.—*Q. Van Weytsen, 33.*

This doctrine is of great antiquity, and is derived to us from the Rhodian law; which prescribes *si levandæ factæ sunt, navis gratiâ jactus mercium omnium contributione sarciatur quod pro omnibus datum est.*—*L. 1, ff. ad Leg. Rho. 1 Emerigon, 602 Taylor v. Curtis, 6 Taunt. 644. 2 Barn. & Cress. 811.*

The sacrifice must be voluntary, and made on an occasion of imminent danger. It must not be the result of a panic or terror, but an act of prudence, to avoid a real danger; it is not indeed necessary, for prudence generally will not permit that the master should wait till the very last extremity. 4 *Maule & Selw.* 146. *Berkley v. Presgrave*, 1 *East*, 22. *Simons v. Loder et al.*, 2 *Barn. & Cres.* 805. *Dodson et al. v. Wilson*, 3 *Camp.* 480.

6. Into how many kinds is jettison distinguished?

Into regular and irregular. Regular jettison is that which is made, not in the moment of perishing, but to prevent an approaching danger; when some time, however small, remains to deliberate whether jettison shall be made, and in what manner, and of what thing.

Irregular jettison is what is made in the instant of danger, when destruction is at hand, and formalities are out of season.—1 *Emerigon*, 605. 1 *East*, 228. *Hughes on Ins.* 288. *Stev. & Ben. on Ave. by Phil.* 62.

7. What exceptions are there to the rule of general contribution for jettison?

First, where goods are stowed on deck, and are thrown overboard, no contribution can be demanded, (except in some particular cases, where the custom is to ship such goods on deck,) though, if saved, they must contribute.

Second, where the owner has no bill of lading for his goods, which raises a presumption that they were put on board without the captain's knowledge.—*Pothier*, 11, § 1, art. 2.

8. What is the rule where a jettison having been made, the ship continues on her course, but is afterwards wrecked, and some of her cargo be saved from the wreck?

What is saved from such wreck must contribute to make good the jettison.—*Leg. Rhod.* 4, 1. *Si navis quæ, &c. Le Guidon*, c. 5, art. 29. *Q. Van W.* 26. *Vin. in Peck.* 246, 250. *Ord. of Sweden*, § 8. *Ord. de Bilbao*, cap. 20, art. 16. *Prussian Law*, § 1790. But on the contrary, if the goods jettisoned be fished up, and taken on shore, and the vessel proceeding on her voyage, be afterwards lost, the goods saved shall not contribute towards such loss, because the loss of the vessel arose from an accident.—*Leg. Rhod. ut sup.* *Q. Van Weyt.* p. 27. *Kaimes' P. R. Eq. b. l. p.* 1, c. 3, § 2, 2. 1 *Emerigon*, 616. *Abbott*, c. 8, § 13. *Hamburgh Ord. tit.* 22, art. 10. *Ord. de la Mar. tit. du Jet.* art. 17. *Code de Com. art.* 420. *Paulus, lib.* 2. *Senten. tit.* 7. *Boulay Paty*, tome 4, 83.

9. What is the rule where goods are put on board of lighters, to float the ship, when aground, or to enable her to pass over flats or shoals, and the lighters be lost?

The loss is considered as a jettison, and the remaining property must

contribute.—*Navis onustæ levandæ causâ, quæ intrare flumen vel portum non poleat cum onore. L. 4 ff. ad leg. Rho.*

But if the ship should be lost, and the goods in the boats saved, then the owners of such goods shall not contribute.—*Leg. Rhod. 4, 1. Si navis quæ, &c. Leg. Wisb. 52. Q. Van Weyt. 24. Roccus de Nav. Note 21, n. 57, 86. Le Guidon, c. 5, art. 29. Vin. in Peck, 246, 250. For Ord.*

10. What if goods conveyed upon deck, in order that the coarser goods below may be got at, be washed overboard?

The damage should be made a general average; or if by the neglect of those at work, or by the motion of the ship, they roll into the sea; or if goods brought on deck, or those uncovered in the hold, on account of the jettison, are damaged by the sea-water, all these losses belong to general average. What difference, said the Roman law, does it make, whether goods are lost by being cast away, or damaged by being uncovered? If he, whose goods are so lost, is to be relieved, he also, whose property has been so damaged, ought to be indemnified.—*L. 4, § 2, de Leg. Rhod. See also, Quint. Weyten, Tractat. Van, t. Recht der Nederlandsche Avarigen, § 20.*

11. How is the rule applied where damage is done to the ships?

All damage purposely done to the vessel, to preserve the whole from impending danger, is general average.—*L. 2, § 1, de Leg. Rhod.* Such as the cutting away of masts, rigging, &c., when the ship is in distress: the cutting or slipping from anchors, to avoid running ashore, or being run foul of, or for the purpose of getting clear of another vessel, &c. The Hamburgh Ordinance of Insurance says, "All the rigging and apparel, cut, slit, or worn, for the preservation of ship and cargo, are general average." By the Prussian law—"it belongs to general average, if masts, sails, yards, rigging, anchors, or any other apparel, are purposely cut, slit, worn, or otherwise damaged or cast overboard, for the preservation of the ship and the goods; also, if for the same purpose the boat must be cut from her scantlings and hauled overboard." And by the French law—"cables, and masts, broken or cut for the common benefit, and anchors or other things abandoned for the same purpose, are general average."—*Hamb. Ord. tit. 21, art. 9, No. 7. Prussia, § 1788. Ord. de la Mar. tit. des Av. art. 6. Code, art. 400. 1 Emerigon, 515. Molloy, b. 2, c. 608. Beawes, 148. Abbott, 346. 1 Rob. Ad. R. 289. 2 Ibid, 257. 2 T. R. 407. 8 T. R. 543. 1 East, 220. 3 Maule & Selw. 482. 3 Campb. 480. 4 Maule & Selw. 149.*

Sales, ropes, and other materials, cut up and used at sea for the purpose of stopping a leak, occasioned by storm, or to raise a jury-mast on a like occasion, or for other extraordinary purposes of a similar nature, which the general safety may require, are considered as the proper subjects of general average.—*1 Emerigon, 629, c. 12, § 14. Boulay Paty tome 4, p. 440.*

12. What is the rule as to a sale of a part of the cargo, by the captain, in case of necessity?

That the sale of the cargo should be adopted as the last resource, but in a case of urgent necessity the maritime law will justify the master. This should, like all other cases where a sacrifice is made, be treated as a jettison—for it is the same thing to the merchant, when the goods are taken from under his control, whether they are sold or thrown into the sea.—*Ord. Bilbao*, § 20. 3 *Rob. Adm. Rep.* 255. 2 *Stark. Rep.* 1. 1 *Rob. Adm. Rep.* 292. *Leg. Oleron*, art. 4. *Ord. France*.

13. What is the rule where a mast has been carried away in a storm and remains hanging over the side, and the rigging is cut away to get rid of the broken mast?

It will depend upon circumstances, whether this shall amount to a cause for general contribution. If the ship was far from port, and could not be navigated to a place of safety without cutting away the rigging, it is held to be no cause of general average. But if the circumstance occurred in sight of a port, which the vessel might reach without the rigging being cut away, and this measure be resorted to, merely to facilitate the manœuvring of the vessel, and to give her and the cargo a better chance to escape the danger; in that case it would indeed be a sacrifice, and the rigging so cut away ought to be allowed for, at the value which it would have had, if not cut away.—*Stev. & Ben. on Av. by Phil.* 112.

14. How is a loss of sales considered, occasioned by carrying an extraordinary press, in order to avoid a lee shore, or to escape from an enemy or pirate?

In England and the United States, a loss occasioned, is considered as particular average and to be borne by the owner.—*Covington v. Roberts*, 2 *New Rep.* 378.

But by the French law, if a master by storm, or pursuit of pirates or privateers, is obliged to endanger his masts by crowding sail (*de forcer ses voiles*) it is general average.—*Ord. de la Mar. tit. du get*, art. 1, 5. *Emerigon*, tome 1, 621. *Code de Com. art.* 400.

The Prussian law enacts, that if to avoid a lee shore the master is obliged to crowd sail for the preservation of the whole, the damage done to the ship and her apparel is to be compensated for in a general average. This is also the practice under the Hamburg law.—*Pruss. Ord.* § 1824. *Stev. & Ben. on Av. by Phil.*

15. What is the rule where boats are cut away?

When boats are obliged to be cut away from the ring-bolts to which they are fastened upon deck, and thrown overboard, it cannot be doubted that their value is to be allowed for in general average, but if by negligence, they were left outside of the vessel, or hung on the ship's stern, it is proper that no compensation be made. This will depend upon usage. From some ports the usage is to carry the boats on the davits.—*V. Weytzen*, § 21. *Stev. & Ben. on Av. by Phil.* 114.

16. What is the rule as to contribution for expenses, seamen's wages, &c., where a vessel in distress puts into a port to refit?

This is a subject upon which the views of legislators and authors, as well as the different customs introduced, are much at variance, and even contradictory to each other. When the general safety requires a ship to go into port to refit, by reason of some peril, the wages and provisions of the crew during the detention are not the subject of general average; but the other necessary expenses of going into port, and of preparing for the refitting the ship, by unloading, warehousing, and reloading the cargo, are general average.—*Beawes, L. M.* 161. *Abbott on Shipping*, 280, 1st edition, and *Bedford Com. Insurance Co. v. Parker*, 2 *Pick.* 8, support the position that the necessary expenses of unloading, and reloading the cargo, when a vessel is forced into a port to refit, are to be brought into general average, for all persons concerned are interested in the measures requisite to complete the voyage.—*The Case of Waldron v. Le Roy*, 2 *Caines' Rep.* 263, assumes that those expenses, in such a case, go into general average; and there seems to be no doubt from the cases, that where the wages and provisions of the crew are to be borne by general contribution, those other expenses are equally a part of it. The cost of the repairs, so far as they accrue to the ship alone as a benefit, and would have been necessary in that port on account of the ship alone, are not average, yet if the expense of the repairs would not have been incurred, but for the benefit of the cargo, and might have been deferred with safety to the ship, to a less costly port, such extra expense is general average. It has likewise been held that the wages and provisions of the crew, during a capture and detention for adjudication, are a proper subject for a general average.—*Ricard, Negoce d'Amsterdam*, 269. *Boulay Paty*, tome 4, 444. *Leavenworth v. Delafield*, 1 *Caines' Rep.* 574. *Kingston v. Girard*, 4 *Dallas' Rep.* 274. 3 *Kent*, 236. In case of seeking a port to refit, and delaying for that purpose merely, though the damage to be repaired may itself be particular average, the wages and provisions during the time of the delay, and the light money paid, and port charges in the port of necessity, are in the United States considered to be general average.—1 & 2 *Phil. Ins. c.* 15, § 4. But the deterioration of the goods by ordinary causes, or in consequence of particular average, is not contributed for in general average.—2 *Phil. Ins. c.* 25, § 4. The *Hamburgh Insurance Law*, tit. 21, Art. 9, No. 2, ordains upon this subject nothing further than that extra pilotage and the expense incurred by a vessel which having become leaky, or on account of any damage, is obliged to enter a port, are to be brought into general average. The practice, however, fully agrees with the principles advanced by Ricard, and the ship alone is charged with nothing except the actual expense of repair.

The Prussian law, §§ 1325 & 1326, expressly enacts, that if a vessel, having sprung a leak, or sustained any other damage, be forced to go into a port; all the charges inwards and outwards, also the maintenance of the crew in port, and their wages, by so much as their amount is augmented, in consequence of such prolongation of the voyage, belong to general average.

By the Swedish ordinance of insurance, § 7, it is even reckoned

general average if a vessel become leaky or strike upon the ground, or upon cliffs, so as to render it necessary to discharge the cargo, and by careening, or otherwise to repair that part which is really damaged by the striking, and the expense of refitting her for again receiving her cargo, and continuing her voyage, also the ship's furniture thereby spoiled; and by the Danish articles, *Dan. Av. No. 6*. The charge of heaving off a vessel which is aground, incurred for the purpose of saving the ship herself, and the lives and goods on board, also the repairs and careening, if the damage have taken place under water. The Italian rule is, that the charges of entering the nearest port, and the repairs of damage incurred to prevent shipwreck, belong to general average.—*Baldasseroni, tome 4, tit. 2, § 30*. The French Code de Commerce, *n. art. 400, § 6*, enacts that the wages and provisions of the seamen, during the detention incurred by a vessel on her passage, being stopped by order of a sovereign power, or during the repair of damages, voluntarily sustained for the common benefit, belong to general average, if the vessel be freighted by the month.—*Projet de code de commerce, art. 310, et 318, et les observations du tribunal de commerce du Havre, tome 2, 1 part, p. 465 et 466. Boulay Paty, tome 4, p. 454*.

The rule in Spain is, that when a captain, by storm, fear of an enemy, or any other unavoidable accident, is obliged to go into a port, and to make some stay there, for the purpose of refitting, or for his security, and not being able to procure the necessary money on credit, or upon bottomry, he should be obliged to sell merchandise at a loss, the damage, on being proved to have been incurred really for the general benefit, is to be placed to general average, *after deducting* that which has been applied to the purchase of provisions, payment of wages, and other requisites for the vessel, all which are to be held particular average at the charge of the captain.—*Ord. de Bilbao, art. 20*.

17. What is the rule for contribution in the case of a voluntary stranding of the ship for the general benefit?

If the ship be voluntarily stranded, to escape danger from tempests, or the chase of an enemy, the damages resulting from that act are to be borne as general average, if the ship be afterwards recovered and perform her voyage. In a case of voluntary stranding, if it be done to save the cargo, the damage to the ship and cargo is the subject of general average; but if it was resorted to, to save the lives or liberty of the crew, it is particular average. The distinction, Mr. Benecke says, is conformable to the practice of all countries.—*Benecke on the principles of Indemnity, 220, 221, 3 Kent's Com. 239*. In England, a voluntary stranding and loss of the ship, is held not to afford a ground for general average contribution, though the cargo should be thereby saved, with but little damage.—*Power v. Whitmore, 4 M. & S. 141. Covington v. Roberts, 2 N. R. 378. Plummer v. Wildman, 3 M. & S. 482, explained 4 M. & S. 149. See 5 M. & S. 431. 2 Barn. & Cres. 7. Taylor et al. v. Curtis, 6 Taunt. 608. 2 Marsh. 309. 4 Camp. 337. 1 Holt, 192, S. C. This was also so held in Bradhurst v. The Columbia Ins. Co., 9 Johnson's Rep. 9, and Eppes v.*

Tucker, 4 Call, 346. But a contrary doctrine has since been declared by the supreme court of the United States.

In the case of *Columbian Ins. Co. v. Ashby & Stribling et al.* 13 *Peters' S. C. Rep.* 337, *et seq.* The court, after a review of the authorities, foreign and domestic, held the true rule to be, in case of a voluntary stranding of the ship, whether she be partially damaged, or totally destroyed, for the general benefit, that the cargo saved, after deducting salvage expenses, becomes a proper subject for general average contribution. And that the freight of a vessel totally lost, by being run on shore for her preservation, and that of the crew and cargo, ought to be allowed to the owner of the vessel, as the subject of general average.

The facts upon which the above was decided were as follows:—The Brig Hope, with a cargo, bound from Alexandria, D. C., for Barbadoes, insured in Alexandria, was assailed, while standing down the Chesapeake Bay, by a storm, which soon after blew to almost a hurricane. The vessel was steered towards a point in the shore, and was anchored in three fathoms water; the sails were furled, and efforts were made, by using cables and anchors, to prevent her from going ashore. The gale increased, and the brig struck adrift, and dragged three miles; the windlass was ripped up, the chain cable parted, and the vessel commenced drifting again, the whole scope of both cables being paid out. The brig then brought up below Craney Island, where she thumped on the shoals, and her head swinging round brought her side to the sea. The captain finding no possible means of saving the vessel and cargo, and preserving the lives of the crew, slipped his cables, and ran her on shore, for the safety of the crew, and preservation of the cargo. The crew and cargo were saved, but the ship became a total loss.

The material part of the very learned opinion of the court in this case is here inserted, and affords an elaborate and clear view of the whole learning upon the point.

It is admitted on all sides, that the rule as to general average is derived to us from the Rhodian law, as promulgated and adopted in the Roman jurisprudence. The digest states it thus. If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all. *Lege Rhodia Cavetur, ut si lerandæ navis gratia jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*—*Dig. lib. 14, tit. 2, c. 1.*

That the case of jettison was here understood to be put as a mere illustration of a more general principle, is abundantly clear from the context of the Roman law, where a ransom paid to pirates to redeem the ship is declared to be governed by the same rule. *Si navis a piratis redempta sit—omnes conferre debere.*—*Dig. lib. 14, tit. 2, c. 2, s. 3.* The same rule was applied to the case of cutting away or throwing overboard of the masts or other tackle of the ship, to avert the impending calamity.—*Dig. lib. 14, tit. 2, c. 3, c. 5, s. 2;* and the incidental damage occasioned thereby to other things. Without citing the various passages from the digest which authorize this statement, it may be remarked, that the Roman law fully recognized and enforced the leading limitations and conditions to justify a general contribution, which have been ever since steadily ad-

hered to by all maritime nations. First, that the ship and cargo should be placed in a common imminent peril; secondly, that there should be a voluntary sacrifice of property to avert that peril; and thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained. Hence, if there was no imminent danger or necessity for the sacrifice, as, if the jettison was merely to lighten a ship too heavily laden by the fault of the master in a tranquil sea, no contribution was due.—See *Abbott on Shipping*, p. 3, ch. 8, s. 2. 1 *Emerigon Assur.* ch. 12, s. 39, art. 7, p. 604. *Ib.* s. 40, p. 605. So, if the ship was injured or disabled in a storm, without any voluntary sacrifice; or if she foundered, or was shipwrecked without design, the goods saved were not bound to contribution.—*Dig. lib.* 14, tit. 2, c. 2, s. 1. *Ib.* c. 7. 1 *Emerigon on Assur.* ch. 12, s. 39, p. 601—603. On the other hand, if the subject of the sacrifice was not attained; as, if there was a jettison to prevent shipwreck, or to get the ship off the strand, and in either case it was not attained, as there was no deliverance from the common peril, no contribution was due.—*Dig. lib.* 15, tit. 2, c. 5, c. 7. 1 *Emerig. on Ass.* ch. 12, s. 41, p. 612, 616. The language of the digest upon this last point is very expressive. *Amissæ navis damnum collationis consortio non sarcitur per eos, qui merces suas naufragio liberârunt—nam hujus equitatem tunc admitti placuit cum jactus remedio cæteris in communi periculo, salvâ nave, consultum est.* It is this language, which seems in a great measure to have created the only doubt among the commentators, as to the extent and operation of the rule; some of them having supposed that the safety of the ship (*salvâ nave*) for the voyage, was, in all cases, indispensable to found a claim to contribution; whereas others, with far more accuracy and justness of interpretation, have held it to apply as a mere illustration of the general doctrine, to a jettison, made in the particular case, for the very purpose of saving the ship and the residue of the cargo. In truth, the Roman law does not proceed upon any distinction as to the property sacrificed, whether it be ship or cargo, a part or the whole; but solely upon the ground that the sacrifice is voluntary, to avert an imminent peril; and that it is in the event successful, by accomplishing that purpose. And therefore, Bynkershoek has not hesitated to declare the general principle to be, that whatever damage is done for the common benefit of all is to be contributed for by all; and that as this obtains in a variety of cases, so especially by the Rhodian law, it obtains in cases of jettison. *Generaliter placere potest, damnum pro utilitate communi factum, commune esse, utque in variis specibus id obtinere aliunde constat, sic ex lege Rhodia, cum maxime obtinet in jactu.*—*Bynker. Quest. Priv. Juri., lib.* 4, ch. 24, introd.

Emerigon, in one passage, lays down the doctrine in the following broad language: "It sometimes happens that, to escape from an enemy, or to avoid an absolute shipwreck, the ship is run on shore in a place which appears the least dangerous. The damage suffered on this account is a general average, because it has been done for the common safety."—1 *Emerigon, Assur., ch.* 12, s. 13, p. 408. And for this he relies upon the *Consolato del Mare*, upon Roccus, Targa, Cassa-Regis, and Valin. It is true, that in another place he says, "The damages which happen by stranding are a simple average for the account of the proprietors;" citing

the French ordinance: and then adds, "But it will be a general average, if the stranding has been voluntarily made for the common safety, provided always that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is, save who can." 1 *Emerigon, Assur.*, ch. 12, s. 13, p. 615. And he then refers to the case of jettison, where the ship is not saved thereby, in which case there is no contribution.—*Ibid*, 616.

Now the analogy between the two cases is far from being so clear or so close, as Emerigon has supposed. In the case of the jettison to avoid foundering or shipwreck, if the calamity occurs, the object is not attained. But in the case of the stranding, whatever is saved, is saved by the common sacrifice of the ship; although the damage to her may have been greater than was expected. Surely the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice; for that would be to say, that if a man lost all his property for the common benefit, he should receive nothing; but if he lost a part only, he should receive full compensation. No such principle is applied to the total loss of goods sacrificed for the common safety. Why then should it be applied to the total loss of the ship for the like purpose? It may be said that unless the ship is got off, the voyage cannot be performed for the cargo; and the safety and prosecution of the voyage are essential to entitle the owner to a contribution. But this principle is nowhere laid down in the foreign authorities; and certainly it has no foundation in the Roman law. It is the deliverance from an immediate impending peril, by a common sacrifice, which constitutes the essence of the claim. The Roman law clearly shows this; for by that law it was expressly declared, that if by a jettison in a tempest, the ship was saved from the impending peril, and afterwards was submerged in another place, still contribution was due from all the property which might be fished up, and saved from the calamity. *Sed si navis, quæ in tempestate jactu mercium unius mercatoris levata est, in alio loco submersa est, et aliquorum merces per urinatores extractæ sunt, datâ mercede, rationem haberi debere ejus, cujus merces in navigatione levandæ navis causa jactæ sunt ab his, qui postea sua per urinatores servaverunt.*—*Dig. lib. 14, tit. 2, l. 4, s. 1.* Boucher, *Instit. au Droit Maritime* (1805;) 449. Abbott on Shipp. part 3, ch., 8, s. 13. And besides, in a case like that now before us, the cargo might be transhipped in another vessel, and the voyage be successfully performed. But in truth, it is the safety of the property, and not of the voyage, which constitutes the true foundation of general average.

If the whole cargo were thrown overboard, to insure the safety of the ship, the voyage might be lost: but nevertheless, the ship must contribute to the jettison. Why, then, if the ship is totally sacrificed for the safety of the cargo, should not the same rule apply? Suppose a ship with a cargo of cotton on board, is struck by lightning, and set on fire, and it becomes indispensable for the salvation of the cargo to sink the ship on a rocky bottom, and she is thereby totally lost,—would not this constitute a case of contribution? Suppose a cargo of lime were accidentally to take fire in port, and it became necessary, in order to save the ship, that she should be submerged, and the cargo was thereby totally

lost, but the ship was saved, with but a trifling injury : would it not be a case of contribution ?

As far as we know, Emerigon stands alone among the foreign jurists, in maintaining the qualification that it is necessary to a general average, that the ship should be got afloat again, after a voluntary stranding. Valin certainly does not support it ; for he only states, that if to avoid a total loss by shipwreck or capture, the master runs his vessel ashore, the damage which he shall suffer on that account, and the expenses and the charges of putting her afloat again, are general average ; and he gives the reason, because all has been done for the common safety.—2 *Valin, Com.* 168. *Ib.* 205, 207, 209. See also, 2 *Bell's Com. p.* 589, 5th edit. 1826. Beyond all doubt, Valin is correct in this statement ; but then he was merely discussing the point, whether the expense of getting the ship afloat was, when she was got off, a subject of general average ; and not the point whether, if the ship was totally lost, the whole loss was not a general average. His reasoning was *diverso intuitu*. On the other hand, he *Consolato del Mare* lays down the rule without any such qualification, *ch.* 192, 193. *Boucher, Consult. de la Mer. ch.* 195, 196, *s.* 487—494 ; as also does Roccus, in his *Treatise de Navibus et Naut. No.* 60. Indeed, it may be found stated in the same general form in the Roman law, where it is said, without referring to the manner and extent of the damage, that the whole damage voluntarily done to the ship for the common good, must be borne by a common contribution. *Sed si voluntate vectorum, vel propter aliquem metum id detrimentum factum sit, hoc ipsum sarciri oportet. Dig. lib.* 14, *tit.* 2, *c.* 2, *s.* 1, *c.* 3, *l.* 5, *s.* 1. And Vinnius in his commentary, after speaking of an involuntary shipwreck, in which case there shall be no contribution, adds : that the damage suffered by a sacrifice made for the good of all, to avoid a common danger, is to be made good by the contribution of all,—*Vinnius in Peckium ad Legem Rhodiam, c.* 5. Voet, in his commentary on the digest, is far more explicit, and asserts, that if the ship is voluntarily run on shore for the common safety, and thus has perished, the goods being saved, contribution is due.—*Voet ad Pand. l.* 14, *t.* 2, *s.* 5,

Bynkershoek has treated the very question in his usual clear and luminous manner. After citing a decision of certain maritime judges of Amsterdam, who held that if a cable of a ship was voluntarily cut to avert a peril, and thereby the anchor as well as the cable was lost, contribution should not be made for the anchor, because there could not be said to be a voluntary jettison ; and who, also for the like reason, held, that if the ship was run on shore and lost, the goods should not contribute, because there could be no contribution unless the ship was saved, (*quia nihil contribuitur, nisi salvâ nave :*) he expressed his pointed disapprobation of the decision, saying that it exhibited very little acuteness, for in all such cases the goods cannot otherwise be saved, and the peril compels us to the act ; and the safety of the ship, in case of a jettison, is not otherwise sought than, the ship being saved, the goods may thereby be saved, and, therefore, the goods saved, and the damage occasioned thereby, ought to be subject to contribution. And he accordingly holds, that the loss of the ship, like the loss of her tackle, is to be deemed a general average, wher-

ever she is sacrificed by a voluntary stranding for the general safety; insisting that this doctrine is fully supported by other authorities cited by him. The doctrine of the Amsterdam judges upon the principal point before them, has been utterly repudiated by all maritime nations in later times, as it seems to have had no foundation in any antecedent adjudications.—*Cleriac, Us. et Coutumes de la Mar. art. 21, 23.* Indeed, there are early positive ordinances of some of the maritime states, which positively provide for the very case of a total loss of the ship by a voluntary stranding as a general average; (as, for example, the ordinance of Königsburg,) and others in which it is usually, if not necessarily implied. See 2 *Magans*, 200, &c. It deserves consideration, also, that the modern maritime writers, Jacobsen, Benecke, and Stevens, all admit this to be the result of the foreign jurisprudence and ordinances.—*Jacobsen, Sea Laws, by Frick, b. 4, ch. 2, p. 358. Benecke on Insur. 219, 221. Stevens on Averages, 33, 34, edit. 1824. See 2 Bell's Commen. p. 589, 5th edit. 1826.* Stevens also, notwithstanding his own opposition to the rule, admits that it appears to have been the practice at Lloyd's, as far back as the time of Mr. Weskett, and that recent opinions of eminent counsel in England, taken on the very point, fully admit and confirm it.—*Stevens on Averages, 33, 35, edition, 1824.* Doctor Browne, in his Treatise on the Civil and Admiralty law, adopts the same opinion, saying, "It has been disputed whether, when a ship was voluntarily run ashore and lost, but the cargo saved, it should contribute, because the rule was that no contribution took place when the ship was lost. But it was truly held that the rule would be absurdly applied to a case where the ship was grounded purposely to save the merchandise, and that with success."—2 *Browne's Civil & Admiralty Law*, 199. From the review of some of the leading opinions in foreign jurisprudence, brief and imperfect as it is, it seems to us, that the weight of authority is decidedly in favor of the present claim for general average.

18. What is the rule of contribution, for a loss by collision or running foul, "abordage?"

The English rule is, that the damage occasioned to a ship and her cargo by being run foul of accidentally, and without fault on either side, ought to be particular average.—*Butler v. Fisher, Abbott, p. 3, c. 4, § 5. Butler v. Wildman, 3 B. & Ald. 404, 405.* This is said to be according to the civil law.—*Dig. 9, 2.* But when in consequence of being run foul of, cables or any tackle are obliged to be cut away, or other expenses of the nature of a general average incurred, these are certainly to be considered as general average.

By the French law, if the collision be fortuitous, the loss is a simple average. But if it happen from the fault of either party, that party must pay the damage. But the cargo on board such vessel shall not contribute, but on the contrary if such cargo receive a damage, the same shall be indemnified by the ship.—*Code Civile, art. 1382. Boulay Paty, tome 4, 502. Bona verò mercatoris libera maneat, Hanséatique Law, tit. 1, art. 2.* In cases where it is impossible to know who were in fault, the damage according to the *judicium rusticorum*, is divided between the ships and the in-

surers answer for that which falls upon the ship by them insured. As to the cargo, the loss is held either to rise from the fault of one of the parties, which party must bear the whole loss, occurring on both ships, or to arise from a *casus fortuitus*, and then the loss is reputed simple average, and borne by the party who has sustained it.—*Valin sur l'art. 10, titre des Avaries. Emerigon, tome 1, p. 418. Code de Commerce, art. 407. Boulay Paty, tome 4, p. 403.*

By the Spanish law, the damage happening to a ship and cargo by the accidental running foul of another vessel, is declared particular average, and each party, as in other casual misfortunes, is to bear his own loss; but if the damage be occasioned by misconduct or negligence, the guilty party must indemnify the other to the full extent of his loss.—*Ord. de Bilbao, cap. 20, art. 34.*

By the Ordinance of Hamburgh, *tit. 8, art. 1*, the damage, in all cases of accidental collision, is to be apportioned on both vessels, their freights and cargoes, as in other general average. The Swedish and Rotterdam Ordinances prescribe the same, if the two vessels running foul of each other were both under sail.

The Prussian law ordains the same, with this difference, that it considers the damage in such cases sustained by the goods as particular average.—*Swed. tit. 8, §§ 1 and 8. Rotterdam, § 255. Ord. Prus. § 1911, 1933.* For cases of loss by a collision, and the rules for the conduct of ships to avoid collision, *See 3 Kent, 230. The Woodrop Sims, 2 Dod. Adm. R. 83. The Thames, 5 Rob. Adm. R. 345. Jameson v. Drinkald, 12 Moore, 148. Marsh v. Blythe, 1 McCord, 360. The Shannon, 2 Hag. Adm. Rep. 173. The Neptune, 2d, 2 Dod. Adm. Rep. 467. Dig. 9, 2. Consulat de la mer, par Boucher, 200, 203. Abbott on Ship. 354. Marshall on Ins. 493. Pardessus Droit Com. tome 3, No. 652. The Ligo, 2 Hag. Adm. Rep. 356. L. 29, § 3, ff. ad legem Aquiliam. Puffendorf's Law of Nature and of Nations, lib. 2, cap. 6, § 8. Jugemens d'Oleron, art. 14, et l'Ordonnance de Wisbuy, art. 26, 50, 67 et 70. Code Civile, art. 1832, 1833, 1834. Code de Com. art. 216, 221. Grotius, lib. 2, cap. 17, § 21. Coquille, Quest. 65. Henrys et Bretonnier, tome 2, p. 42. Boutaric, Inst. p. 278. Targa, cap. 53. Cleirac, sur l'art. 15, des jugemens d'Oleron. Boulay Paty, tome 4, p. 492. Pothier, No. 155.*

19. What is the rule as to contribution for the wages and provisions of the crew during a detention by embargo?

It is a point upon which the American decisions are divided, whether the wages and provisions for the crew during a detention by embargo are or are not general average. In *McBride v. Marine Ins. Co.* 7 Johns. Rep. 431, it was held that they were not. And that was also the opinion of the court in the case of *Spafford v. Dodge*, 14 Mass. Rep. 66, who said there was no distinction between the case of an embargo and a hostile seizure; on the other hand, the ultimate decision of the case of *Jones v. A. Ins. Co. of N. America*, 4 Dall. 24, and *S. C.* on appeal, 2 Binn. 547, is, that such expenses are general average.—*Story's Abbott, Ed. 1829, p. 351, n. 1. In Robertson v. Ewer, 1 T. R. 127. Martin v. Salem Ins.*

Ob., 2 *Mass. Rep.* 329. *Cited* 1 *Phillip*, 252. The decision was against allowing wages and provisions in general average in such cases.

20. What is the rule on the subject of wages and provisions in case of detention by hostile capture?

They have been held in New-York to be general average.—*Leavenworth v. Delafield*, 1 *Caines' Rep.* 573. *Penny v. New-York Insurance Co.*, 3 *Caines*, 155. In Massachusetts a contrary decision has been given.—*Spafford v. Dodge*, 114 *Mass. Rep.* 66. But if any of the expenses are incurred on account of the cargo separately, they are not general average.—*Watson v. Marine Ins. Co.*, 7 *Johns. Rep.* 57. All these cases are cited more fully in 1 *Phil. Ins.* 350, 351. *Story & Abbott, Edition of 1829*, p. 351, n. 1. When neutral vessels, in time of war, are arrested and carried into a port for examination, the charges of reclaiming them are undoubtedly general average, if incurred for the liberation both of ship and cargo. Baldasseroni quotes several instances, and a circumstantial award from the Marine Court of Pisa.—*L. c.* § 20, *Seq. and p.* 234, by which it appears that the charges expended for the release of both ship and cargo, and particularly the latter, also the seamen's provisions and wages, and the bottomry premium granted for providing the necessary funds, were made good by general contribution. The same is done in *Hamburg*, and was formerly so in *Holland*.—*Ricard, Negoce d'Amst.*, p. 279. *Verwer*, § 1. *Emerigone*, tome 1, p. 631. *Sirey*, tome 7, 2d part, p. 779.

21. What if a ship be arrested under suspicion that she has enemy's property on board, and the captain succeed in persuading the captor that a part of the cargo is neutral?

The part of the hostile cargo thus saved "*par cette ruse de guerre*," shall contribute in general average to that which was confiscated.—*Stracha de Nautis*, part 5, § 5. *Cassa-Regis*, disc. 46, n. 62.

22. What is the rule of contribution for expenses incurred for medical treatment, and subsistence of the crew, wounded in defending the ship against pirates or enemies?

The rule of the French code is, that such expenses are a general average charge, *les pansements et nourriture des matelots blessés en défendant la navire sont avariés communes*.—*Code de Commerce*, art. 272. *Ord. de la Hanse Teutonique*, art. 35. *Ord. de la Marine*, art. 6. And there is no distinction whether the wound is received from the arms of the enemy, or by accident in manœuvring the ship during the combat.—*M. Locre, sur l'art 400, du Code de Com.* These expenses are not a subject of general average contribution in England and the United States.

Where one of the crew is sent on a commission out of the ship and is wounded, or made a slave, if he was sent for the service of the ship only, the damage shall be simple average and chargeable to the ship, if he was sent for the benefit of the cargo, the proprietors of the cargo shall bear the loss, but if he was sent upon the common service of the ship and

cargo, the average shall be general.—*Argument de l'art*, 268. *Boulay Paty*, tome 2, p. 260. *Delvincourt*, *Institutes du Droit Commercial*, t. 2, p. 246, No. 4. *Pothier*, *louage des matelots*, No. 222. *Valin*, art. 17, *titre des Loyers*, etc. The expense of curing wounded seamen, unless the combat shall have prevented the vessel from being taken, shall not be general average; for if she shall have fallen into the enemy's hands, though she find means to escape afterwards, and so saves herself, the damage suffered by the combats shall not be the subject of general average contribution.—*Pothier*, *louage des matelots*, No. 197. The wages due to the heirs of those killed, or who die of their wounds received in combat, are also the subjects of general average if the ship arrive at her port of destination.—*Code de Commerce*, art. 265. Damage sustained by the ship or cargo in combating an enemy, if the enemy be avoided, must be made good by general average.—*Valin sur l'art*, 6 l'Ord. de la Mar. tit. des Avaries. *Pothier*, tit. des Avaries, No. 144. *Emerigon*, tome 1 p. 267, § 8, says, this shall give rise to simple average only, and where the vessel is arrested by the order of a friendly power, the wages and provisions of the crew where the vessel is chartered by the month are the subject of general average; but if she be hired by the voyage those expenses are simple average only.—*Argument des art*. 253 et 276. *Obs. du Tribunal de Commerce du Havre*, tome 2, 1st part, p. 465 et 466. *Boulay Paty*, tome 4, p. 453. Ammunition expended in defence is not reckoned general average by the *Hamburgh ordinance*.—*Hamb. Ord. c. art. 10*, by the *Prussian Ord.* § 1835, on the other hand it is specially included. The *Hamburgh*, *Swedish*, *Prussian*, *Danish* and *Spanish laws* admit as general average the charges of healing and attending the wounded in an engagement, also allowances to widows and orphans of the killed.—*Hamb. l. c. art. 9*, No. 5. *Prussia*, §§ 1837, 1838. *Ord. de Bilb. c. 20*, art. 17. *Baldass.* 4, p. 91. By the *Ordinance of Hamburgh*, tit. 21, art. 9, No. 10, charges occasioned by extraordinary quarantine and unavoidable incidents, are general average.

23. How is damage occasioned by fire considered?

Damage by fire, whether occasioned by lightning, by the intrinsic quality of the goods, or by other accidental causes, is doubtless particular average. But if sacrifices be made, in order to extinguish the fire, if masts or cables, for instance, be cut away, or the vessel be run ashore, the damage ought to be general average.

The effect of the water thrown upon the burning goods to extinguish the fire, is particular average; it is not an injury, but a real advantage done to them. But the damage done by the water to other goods is of the nature of a general average.

In the *Ordenanzas de Bilbao*, chap. 20, art. 21, it is ordered that when a vessel catches fire in a river or harbor, and an adjoining vessel is sunk, in order to save the others, the damage must be made good by a contribution from all the other ships and cargoes. It has been held in one case in *Massachusetts*, that temporary repairs which are of no value after the termination of the voyage, are general average.—*Brooks v. Oriental Ins. Co.*, 7 *Pick.* 259. *Cited 2 Phillips Ins. c. 15*, § 2, No. 12. The expense

of towing a disabled ship is sometimes general average, and this expense often appears in masters' accounts since the general use of steamboats was introduced. But this expense is general average only when the occasion of it is so. If, for instance, a vessel is making a port of necessity to refit, the expense of making which is, in the United States, general average, then the expense of hiring a steamboat to tow her will also be general average. But the hiring of a steamboat to tow a ship into, or out of the Mississippi, to avoid delay on the regular voyage, would be a part of the ordinary expense of navigation, to be borne by the owners.

24. What is the rule as to money which the captain is obliged to raise abroad, in order to enable him to prosecute the voyage?

It appears to be a rule established in all countries, without exception, that if a vessel, for the necessities of which, upon her passage, bills have been drawn, arrive safely at the place of her destination, the charges incurred in drawing, such as commission, loss in the exchange, interest of money advanced, &c., must be added to the other expenses, and repaired by the parties interested, according to their respective shares: so that the charges of raising money for defraying expenses of the nature of a general average, belong to general average; those incurred for paying a particular average on the vessel, constitute a particular average on the vessel, &c.—*Ord. de Bilbao, chap. 24, art. 38, y. 39. Dan. Law, tit. 6, art. 5. Hamb. Stat. T. 2, tit. 14, art. 5, 7, 8. Swed. c. 2, y. Hamb. Ord. tit. 14, art. 2. Tit. 15, art. 2, 4. Stev. & Ben. on Average, by Phil. 172.*

In the absence of the master the mate has a right to hypothecate the ship or to sell a part of the cargo for the purpose of paying salvage.—*By Lord Ellenborough in Parmeter v. Todhunter, 1 Campb. 542.* To constitute a valid sale on hypothecation by the master there must be a pressing necessity, and no other known means of prosecuting the voyage.—*The Gratitude, 3 Rob. Adm. Rep. 240. Johnson v. Shippen, 2 Lord Raym. 984. Ried v. Darby, 10 East, 157. Freeman v. East India Co., 5 Barn. & Ald. 617.* The master must not sell a part of the cargo if he cannot, by selling that part, save the rest of the cargo; nor must he hypothecate the whole, if he cannot by that hypothecation save a part of the cargo.—*Morrison v. Noorman, in Chancery, 1822. Dobson v. Wilson, 1 Camp. 480.* If the sale of the goods be effected, for reasons which constitute a general average, it cannot be doubted that a general contribution must take place, whether the ship and cargo reach their destination or be lost.

If the cause of the sale be a mixed one, that part will be made good by general average contribution, which was applied to disbursements of that kind, and the owners will be presently liable for the remainder.—*Stev. & Ben. on Av. p. 193. Richardson v. Nourse.* If the money raised by the hypothecation of ship and cargo was applied to expenses of the nature of a general average, it appears certain that a ship-owner cannot be made answerable for the prejudicial consequences which any individual party may eventually sustain from that measure. If, therefore, the vessel becomes unseaworthy upon the continuation of her voyage, and the lender

on bottomry pays himself out of the goods of any one of the owners, I am of opinion, that after each owner has paid his original share of the debt, as far as the property saved for him is sufficient for this purpose, the deficiency ought to be made good by contribution among those of the proprietors who have any surplus saved. This will be made clearer by an example.

Suppose a ship and her cargo to have been hypothecated in a foreign port (with benefit of salvage to the lender) for disbursements of the nature of a general average, to which each party has to contribute 40 per cent. upon the original value, including maritime interest, namely:

The owner for ship and freight on	-	£3,000	£1,200
A for goods,	-	6,000	2,400
B for goods,	-	4,000	1,600
		<hr/>	<hr/>
		£13,000	£5,200

The vessel having become unseaworthy in the prosecution of her voyage, the wreck and part of the freight saved, produced together, £1,000

The goods of A saved, produced - - - - - 4,200

Those of B, - - - - - 3,000

It ought to make no difference here, whether the goods of A alone, or those of B also, be sold to discharge the bottomry bond.

The ship-owner, instead of £1,200 originally due by him, now pays, - - - - - £1,000

A his original share, - - - - - 2,400

B, - - - - - 1,600

And the deficiency of £200 is to be made good by A and B in the following proportions:—

£4,200 are saved for A; of which
2,400 being deducted,

£1,800 remain.

£3,000 are saved for B; of which
1,600 deducted,

£1,400 remain.

A has, therefore, to pay 3,200 : 1,800, = 200 : 112 10
B, 3,200 : 1,400, = 200 : 87 10

£5,200

Thus the hypothecation in one sum is made to correspond as nearly as possible with the hypothecation of each separate interest, which must certainly be the most correct method. Had the goods of B been totally lost, A would have no claim against him.—*Stev. & Ben. on Average, by Phillips, 201.*

25. What is the rule as to contribution where extraordinary expenses are incurred for the purpose of sailing with convoy?

When a vessel in time of war is chartered to sail without convoy, the master cannot be justified in waiting at an intermediate port for convoy, on account of any ordinary peril of war, much less can the expense arising therefrom be general average.—*Bynkershock, Quæs. jur. priv. L. 4, c. 25.*

But when by an imminent danger the protection of a man-of-war, or a delay in port, is rendered necessary, it can admit of no doubt, that the charges thereby occasioned are general average: Of this the above cited author gives the following instance: A vessel was chartered from *Amsterdam* to *Cadiz*, under an agreement that she was to sail with a man-of-war to *Lisbon* or *Oporto*; in the latitude of *Lisbon*, the convoy was attacked by several hostile ships; some of the vessels were taken, others at a signal given by the convoy ship, escaped into *Lisbon*. Among these was the above vessel, which was obliged to remain there six months before she could safely proceed on her voyage. The expenses occasioned by the delay were, by all the three courts, declared to be general average; this being not an accidental, but a voluntary detention occasioned by imminent danger. To prove that the expenses of a necessary convoy belong to general average, *Emerigon* relates the following case: Some vessels bound to *Acre* which had put into *Cyprus* were prevented from continuing their voyage by two English privateers at anchor in a port of the same island, and by moreover learning that two more English privateers were cruising in *Acre* roads.—1 *Emerigon*, 626. *Ibid*, 556. *Bald. tome 4, tit. 2, § 65.*

By the Prussian law, if a vessel must wait for convoy, or remain for some time in a neutral port, owing to a risk apprehended from an enemy, the wages and maintenance of her crew during that period in proportion as their amount is augmented by such prolongation of the voyage, are general average.—*Pruss. §§ 1827 & 1828.* There has been no decision upon this point either in the courts of England or the United States. But Lord Tenterden considers this a proper case for general average.—*Abbott on Shipp. Story's edit. of 1839, p. 253.*

26. What is the rule of contribution in cases of ransom or a compromise to prevent the plundering of the ship?

That when a captain to avoid capture or plunder, compounds with privateers or pirates, by giving them money or a part of the cargo, or promising to pay a sum for ransom, this loss, according to the nature of the subject, and to most laws, belongs to general average.—*L. 2, § 3, de Leg. Rhod. Ord. de le Mar. art. 6. Tit. des Avar. Code, art. 400, N. 1 Hamb. Ord. tit. 21, art. 9, No. 4. Pruss. § 1829, 1834. Swed. § 5, Dan 1, N. 8 & 12, 2, No. 2, et seq. Weightsen, § 28. Ord. de Bilbao, c. 20, art. 9.* The Hamburg and Swedish ordinances enumerate under this head, also, the goods which are taken out of the ship by privateers not belonging to the enemy's party, under a promise of payment which is not fulfilled.—*Hamb. 1, c. No. 9, Swed. 1 c. § 10.*

If a ship, to avoid the enemy, is obliged to take shelter under the guns of a fort, the expenses incurred during this forced delay are general average, if the vessel was hired by the month.—*Pothier des Avaries, No. 151*, or if the captain, to avoid an enemy, is obliged to take a longer

course, the extraordinary expenses incurred by this deviation, must be considered as general average. Also, where the vessel has been abandoned by the crew through fear of being made prisoners or slaves, even if the fear had been erroneous, if, under the circumstances, it was reasonable and well-founded, all expenses of recovering the vessel and cargo are general average.—*Targa, chap. 60.*

This is contrary to the English rule.—*Taylor v. Curtis*, 6 Taunt. 608.

The Rhodian law holds the following language: *Omnium contributio ne sarciatur, quod pro omnibus datum est.*—(L. 1 ff. de leg. Rhod. de jact.) *Æquissimum enim est, commune detrimentum fieri eorum qui propter amissas res aliorum consecuti sunt et merces suas salvas habuerunt.*—(L. 2, § 1, ff. eod. *Les Jugemens d' Oleron*, art. 9: *l'Ordonnance de Wisbuy*, art. 12, *l'Ordonnance de 1681*, titre des *Avaries*, art. 6, etc.)

OF THE ADJUSTMENT OF GENERAL AVERAGE.

1. What is the rule as to what must contribute to a general average?

The general doctrine is, that all the merchandise, of whatsoever kind, or weight, or to whomsoever belonging, contributes. The contribution is made not on account of incumbrance to the ship, but of safety obtained, and therefore, bullion and jewels put on board as merchandise, contribute according to their full value. By the Rhodian law, 1 *Dig.* 14, 2, 2, it was deemed just that all should contribute to whom the jettison had been an advantage, and the account was to be apportioned according to the value of the goods. It extended to the effects and clothes of every person, and even to the ring on the finger, but not to the provisions on board, nor to the persons of freemen, whose lives were of too much dignity and worth to be susceptible of valuation.—3 *Kent*, 240. *Abbott on Shipp.* part 3, ch. 8, sec. 14. *Magens on Ins.* vol. 1, 62, 63. *Dominus navis, et domini omnium rerum in ea existentium, excepto libero corpore et cibariis, proportionem destinationis contribuant; ad quod magister ex locato tenebitur.* L. 2, § 2, ff. de leg. Rhod. de jactu.

2. What is the rule for the valuation of goods, in adjusting a general average loss?

When the average is adjusted at the port of discharge, the universal practice now is, to take the actual value of the cargo, at the market price, stripped of all the charges attached to it, as freight, duty, and landing charges. And if a jettison has taken place, then the estimated proceeds of the goods jettisoned, taken in the like manner, should be added to the net value of the cargo saved.—*Leg. Wisb.* art. 39. *Ord. Ph.* 2, art. 6, tit. des dom. *Old. Stat. Hamburgh*, p. 2, tit. 16, art. 2. *Ord. de la mar. du jet.* art. vi. *Ord. Königs.* n. 37. *Q. V. Weyt.* p. 12. *Malynes*, c. 25. 2 *Val. Com.* 297. *Emer.* 12, § 43. *Poth.* n. 121, 123, 128. *Leg. Rhod.* 1, 2, § 4, p. 4. *Q. Weyt.* p. 27. *Grotius Intro. Jur. Holl.* c. 29. *Pec. ad Leg. Rhod.* n. 196. *Ord. Ratt.* 116. *Magens*, p. 69.

The goods must contribute according to their value in the state in which they arrive at that place. The same rule is to be followed under similar circumstances for disbursements, if the goods arrive in a sound state, or if they were diminished in value by internal decay or external damage, previous to the period at which the disbursements were made. But if damaged goods are sold at the intermediate place to prevent their further destruction, the net amount for which they were sold at that place will be the sum for which they must contribute to the general average.

But if goods prove to have been either damaged or spoiled subsequently to the disbursements being made for them, they ought to contribute towards such disbursements for their entire value, because the same would have taken place if the whole of the ship and cargo had been lost on the continuation of the voyage. Thus it may happen that the same goods will have to contribute in different proportions to several distinct claims of general average. Suppose, for instance, a vessel to be retaken and salvage paid for the cargo which at that time was sound, and a new general average to take place on the continuation of the voyage, and after the cargo was damaged, then the cargo will have to contribute towards the first general average according to its full value, and to the second, according to its diminished value at the time of its arrival.

Ammunition and provisions are exempted from contributing towards a jettison, although if cast overboard their amount was refunded.—*C. Abbott, p. 3, ch. 8, § 14. Hamb. Ord. tit. 22, art. 7. Ord. Tit. du jet. art. 11. Code, art. 419. Pruss. § 1869. 4 Bingham, 119, cited 2 Phillips' Ins. c. 15, § 12.*

The most unexceptionable mode of settlement, as being the least likely to create dispute, is to adjust the average claim after the ship has arrived at her port of discharge; the next best mode is to settle it at the port of loading; *an adjustment at an intermediate port* ought always to be avoided. By an intermediate port is meant, any *foreign* port where the ship may put in in distress. If the ship be lost short of her port of destination, and the cargo be saved and sent on, then the *freight* (which is in the cargo) must contribute its proportion to the charges of salvage.—*Kaimes' Pr. Eq. b. 1, p. 1, c. 3, § 2, art. 2.*

3. What is the rule for estimating the value of the ship for the purpose of general average?

The true value of the ship for contribution, is the amount that her hull, masts, yards, sails, rigging and stores would produce after the sacrifice is made, with the addition of the amount made by the general average contribution.

The only value to be attended to in the adjustment of a general average is, what the vessel is worth to her owner, and this value is neither increased nor diminished by an accidentally great or small demand for shipping, or by the circumstance of a vessel being of less value in a foreign country than in her own, if she is not meant to be sold at all. The sum, therefore, for which the vessel has to contribute towards a loss by articles sacrificed and not replaced during the voyage, adjusted at the

port of destination, is what she is worth to her owners in the state in which she arrives.

But in all those cases in which the cargo is obliged to contribute for its value, at the time of the accident, without reference to a subsequent diminution, the vessel ought to contribute also for that value, this being the only way of placing all parties upon an equal footing.

The vessel, moreover, must contribute also for that amount allowed to her by the general average contribution, as for cables cut or slipped, &c., for the same reason for which the owner of goods cast overboard contributes for their amount.

It is a matter of great difficulty, as may easily be perceived, to determine the sum for which the vessel ought to contribute, and very frequently an approximation to truth is all that can be expected.

It is frequently the best guide for determining the contributory interest to make the valuation in the policy of insurance the basis of the calculation. And then it is to be considered whether the ship was insured at her full value at the beginning of the voyage; including the outfit, advanced wages, and premium, and the net freight, or without outfit, and after deducting the probable wear and tear, and the gross freight.

In the first case, the outfit, such as provisions, &c., wear and tear, and premium, are to be deducted, but not in the latter.

But as underwriters in this country are always held liable for the provisions, they must be considered as included in the valuation of the ship. And because it is usual to include the premium, and not to deduct for probable wear and tear, though this practice be erroneous, all this, if included in the valuation, must be deducted for the purpose of determining the amount for which the ship is liable to contribute. Besides this, the *whole damage* sustained by the vessel is not to be deducted when the contribution regards articles sacrificed and not paid for during the voyage, but the *part only of the damage* sustained before the accident which occasioned the general average, when the claim for general average arises out of disbursements, and the amount of the damage of the vessel allowed for in general contribution, is to be added.

In New York and Philadelphia the ship contributes on four-fifths of her value at the commencement of the risk.—*Leavenworth v. Delafield*, *Caines' Rep.* 573. *Story's Abbott*, c. 8, § 15. *Phil. on Ins.*, c. 15, § 10.

The value of the vessel lost is estimated according to her value at the port of departure, making a reasonable allowance for wear or tear on the voyage up to the time of the disaster. As to losses of the equipment of the ship, such as masts, cables, and sails, it is usual to deduct one-third from the price of the new articles; for being new, they will be of greater value than the articles lost.—3 *Kent's Com.* p. 242. *Abbott on Shipp.*, part 3, ch. 8, § 14, 15. *Strong v. Fire Ins. Co.*, 11 *Johns. Rep.* 323. *Simonds v. White*, 2 *Barn. & Cres.* 805. *Gray v. Waln*, 2 *Serg. & Rawle*, 229, 257, 258.

4. What is the rule as to the contribution of freight?

The freight pending at the time of the jettison or other sacrifice con-

tributes to the average.—1 *Phil. on Ins.* 360. And if wages and provisions are to be subsequently expended in order to save the freight, the expense of them is to be deducted, in ascertaining the amount on which freight is to contribute.—1 *Phil. Ins.* 361. 2 *Id. c.* 15, § 11, *No.* 2. And in case of a part of the freight being earned and due at the time of the jet-tison, as by the previous discharge of a part of the cargo, only the freight of the goods remaining at risk contributes.—*Phil. Ins., c.* 15, § 8, *No.* 1.

It is the practice in the United States, to ascertain the contributory amount of the freight, by deducting one-third from the gross amount.—3 *Mason's Rep.* 439.

When the general average is settled at the port of loading, and the freight has been paid in advance, it is customary to consider it as a part of the value of the cargo, and to add it to the amount for which the latter has to contribute. No deduction is made of a proportionate part of the wages yet to be paid, probably because the mariners are held entitled to wages in proportion to the freight advanced, although the ship happen to perish before her arrival at the port of delivery.—*Abbott on Shipp.* 1. *Edward Adm. Rep.* 223.

5. What is the rule for the contribution of freight, where the ship is chartered for the voyage out and home, under the stipulation that no freight is to be paid for the carriage of the outward cargo, unless the ship bring back her homeward cargo in safety?

In the case of *William v. The London Assurance Co.*, 1 *Maule & Selw.* 318, the court of King's bench adjudged, that the whole freight was to contribute, the whole of it having been saved by the measures taken for the general benefit. But Mr. Benecke, in his Treatise on Indemnity, opposes this judgment as being a hardship upon the owner, which he explains by the following example. Suppose the value of a cargo from London to Bombay and China to be £100,000, and the value of the ship, £52,000; the whole freight for the voyage out and home, payable after the ship's return to London, £36,000; charges and provisions in India, for the homeward voyage, £4,000; wear and tear of the vessel, on the voyage out and home, £2,000 each; sailors' wages, &c., payable on the ship's arrival in London, £3,000.

If a general average takes place upon the outward voyage, and the cargo contribute according to its prime cost, although its value may be supposed to have been increased by being transported to a country where it is likely to find a profitable sale, it is evident that the owner contributes for less than what was really saved to him.

If it contributes for the value which it has at the place of its destination, it contributes for what was really saved at the time, and is now in the hands of its owners. The same observation applies to the ship. But if the freight were to contribute for
£36,000
 or even deducting wages, &c., payable in London,
3,000

for £33,000

This would not be the amount of freight really saved at the time, but an amount which, in order to be realized, neces-

	Brought over,	£33,000
sarily required further expenses and risks. The owner will be obliged, for that purpose, to pay for charges and provisions,		£4,000
His vessel, supposed to be worth at the termination of the outward voyage, after the wear and tear of that voyage,	£49,400	
Will further lose in value in the homeward voyage,	2,600	
	<hr/>	2,600
	46,800	
This value of the vessel, as well as the freight,	33,000	
	<hr/>	
	£79,800	

He must run the risk of losing on the homeward voyage, which risk we will suppose to be worth,

3,400
<hr/> 10,000

So that his expectation with regard to freight, leaving interest out of the question, is worth to him only £23,000
For which, consequently, he cannot be bound to contribute as for £33,000.

But even supposing the freight to contribute only for £23,000, still it would contribute too much in proportion to the cargo, if the latter contribute according to its value at the termination of the outward voyage, that is, without the profit expected upon the return cargo; for these £23,000 include the expected profit of freight on the homeward voyage.

The following example of the form of adjusting a general average contribution is taken from a distinguished French writer on commercial law, and is supposed to present a clear view of the principles which govern in settling all such cases.

**ESTIMATE OF GENERAL AVERAGE CONTRIBUTION ON SHIP, CARGO,
AND FREIGHT.**

Losses subject to Contribution.

- | | |
|--|-----------------------|
| 1. Damage done to the ship—
in effecting a jettison,
by loss of anchors for the common benefit, | francs 3,000
1,500 |
| 2. Loss sustained by the goods of E by reason of the jettison, | 30,000 |
| 4. Loss sustained by the goods of F, | 19,500 |
| 4. Jettison of 40 bales of linen belonging to G, the real value
of which was 30,000f., but which were valued in the in-
voice at | 25,000 |
| 5. Jettison of 40 barrels of sugar belonging to H, valued in
the invoice at 20,000f., but the real value of which was | 15,000 |
| 6. Jettison of goods belonging to I, estimated at | 54,000 |
| 7. Jettison of 1 barrel of tobacco, part of an invoice of 6 bbls.
belonging to K, and which had been stowed on the deck,
entered here at | |

Losses not subject to Contribution.

Brought over,	francs 148,000
8. Loss of the clothing of the crew,	2,250
9. Loss of munitions of war and provisions,	9,750
Total,	<u>fr. 160,000</u>

Suppose the mass of objects subject to contribution as follows :

1. The goods of A, estimated at	francs 90,000
2. The effects of B, a passenger,	6,000
3. The goods of C, the real value of which is 30,000f., but which are valued in the policy at	39,500
4. The goods of D, which are valued in the invoice at 15,000f. but are here estimated according to their real quality,	19,000
5. 5 barrels of tobacco saved of the invoice of K, and stowed upon the deck, estimated at	1,500
6. Estimation of the ship,	33,000
The freight,	15,000
Aggregate,	<u>48,000</u>

Of which the moiety is	24,000
Damage caused to the ship by the jettison,	3,000
By loss of anchors,	1,500
	<u>4,500</u>

Total for the ship,	28,500
7. The goods of E,	45,000
General average sustained by these goods,	30,000
	<u>75,000</u>
8. The goods of F,	27,000
General average on ditto,	19,500
	<u>46,500</u>
9. Jettison of 40 bales of linen belonging to G,	25,000
10. Jettison of 30 barrels of sugar belonging to H,	15,000
11. Jettison of the goods of I,	54,000
Total mass,	<u>fr. 400,000</u>

Each of these objects, subject to the payment of average, must contribute for $\frac{1}{4} \frac{60,000}{0,000} = \frac{2}{5}$ of their value, as estimated in the above table.

And the re-partition for the payment of the loss will be as follows :

1. The goods of A, estimated at 90,000f. ; two-fifths of 90,000,	36,000
2. The part of B, two-fifths of 6,000,	2,400
3. The goods of C, two-fifths of 39,500,	15,800
4. The goods of D, two-fifths of 19,000,	7,600
5. The 5 barrels of tobacco K saved, two-fifths of 1,500,	600
6. The ship for two-fifths of 28,500,	11,400

	Brought over,	francs 73,800
7.	The goods of E, two-fifths of 75,000,	30,000
8.	The goods of F, two-fifths of 46,500,	18,600
9.	The 40 bales of linen thrown overboard, belonging to G, for two-fifths of 25,000,	10,000
10.	The 30 bbls. of sugar thrown overboard, for 2-5ths of 15,000,	6,000
11.	The goods thrown overboard, belonging to I, for two-fifths of 54,000,	21,600
Total,		fr. 160,000

The contributables which have not sustained any loss, or which are not the subject of indemnity, pay their portion of the contribution without any deduction. Thus A pays 36,000f.; B, 2,400f.; C, 15,800f.; D, 7,600f.; and K, 600f.

Those contributables which have suffered loss, and which are the subject of indemnity, bring into confusion the sums at which they are valued in the mass of contributions; and as this sum is to their value in the mass of losses, so will they receive or pay.

Thus the ship is valued in the mass of losses at 4,500f., and in the mass of contributions at 11,400f.; she must therefore pay 6,900f.; and in like manner will the quota of the other items be ascertained.

The value of the loss of those things not subject to contribution must be taken entire from the mass of contributions.

All the items being calculated as above the mass of effective contributions will stand thus :

A contributes	-	-	-	36,000
B "	-	-	-	2,400
C "	-	-	-	15,800
D "	-	-	-	7,600
K "	-	-	-	600
The ship	-	-	-	6,900
Total,				fr. 69,300

The distribution will be as follows :

F will take	-	-	-	900
G "	-	-	-	15,000
H "	-	-	-	9,000
I "	-	-	-	32,400
The mariners	-	-	-	2,250
The proprietors of the ship, for munitions of war and provisions,				9,750
				fr. 69,300

[*Boulay Paty, tome 4, p. 574, et seq.*

6. What is the rule as to the liability of the underwriters for claims of

general average, adjusted in a foreign country, according to the laws of that country?

The rule is, that when a general average is fairly settled in a foreign port, according to the law of that port, it is binding, though settled differently from what it would have been in the home port.—11 *Johns. Rep.* 323. *Lewis v. Williams*, 1 *Hall's N. Y. Rep.* 430. 2 *Barn. & Cresw.* 805. *Simonds v. Larder*, 2 *B. & C.* 803, *S. C.* 4 *D. & R.* 375. 9 *Serg. & Lowb.* 250, cited 5 *Phil. Ins. c.* 15, § 13. *Dalglish et al. v. Davison*, 5 *D. & R.* 6. 2 *Phil. Ins. c.* 15, § 13. *Depeau v. Ocean Ins. Co.*, 5 *Cowen*, 63, cited 2 *Phil. Ins. c.* 15, § 13. *Shiff v. Louisiana Ins. Co.*, 6 *Martin, N. S.* 629. *Power v. Whitmore*, 4 *Maule & Selw.* 141.

SIMPLE OR PARTICULAR AVERAGE, AND PARTIAL LOSS.

1. What is understood by the term particular average?

The foreign ordinances and writers use the term "particular average loss," or "simple average," merely in opposition to a general or "gross average loss;" contenting themselves with assigning as a reason for this distinction, that the one species of loss is to be borne *generally* by all the parties concerned, and the other *particularly* by one of them.—*Tout dommage arrivé par pure fortune de mer est avarie simple ou particulière. Boulay Paty*, tome 4, 473. *Si conservatis mercibus deterior facta sit navis, aut quid exarmaverit, nulla facienda collatio. L. 2, § 1, ff. de leg. rhod. Le Guidon de la mer. chap. 5, art. 20. Says, si, par fortune de tems, on fait perte de câbles, ancres, voiles, cordages du navire, le marchand, n'y est contribuable; mais tout ce dommage tombe sur bourgeois et le nef.* We find the same decision in the *Ordonnance de la Hanse-Tentonique*, tit. 8, art. 1, and in the *Ordonnance of Wisbuy*, art. 12, damage by lightning or by fire of the enemy are simple average.—*L. 6, ff. de leg. rhod. Guidon de la mer, ch. 5, art. 5.* All losses arising *extitio rei et intrinsicâ ejus naturâ*, are simple average. All losses arising from the unseaworthiness of the ship, or from robbers, *quod prædones abstulerint, eum perdere, cujus fuerit. L. 2, ff. de leg. rhod. Guidon de la mer, chap. 6, art. 1.* Goods given as a composition to pirates or robbers are common average; damage by shipwreck, unless voluntary for the common benefit, is simple average; for, in such case, the maxim is, *save who can.*—*L. 7, ff. de leg. rhod.* All expenses resulting from delay occasioned by fortuitous loss of cables, anchors, sails, masts, or cordage, are simple average.—*Hic enim sumptus instrumentæ magis navis, quam conservandarum mercium gratiâ factus est. L. 6, ff. de leg. rhod.* Losses occurring in transporting the goods to the shore in lighters or barges are simple average, and must be borne by the owners of the merchandise; and this, notwithstanding an agreement to the contrary with the freighter.—*Pothier des Avaries*, No. 145, et *Ricard, Négoce d'Amsterdam*, p. 280. All expenses of the ship during quarantine are simple average; in fine, all damage and expense incurred by, or on account of the ship only, or of the cargo only, and all damage which they may sustain for other cause than a common benefit, are simple average.—*Boulay Paty*, tome 4, p. 481.

2. By whom is a simple average loss to be borne?

By the owner of the thing which has sustained the damage or occasioned the expense.—*Code de Commerce*, art. 404. But in case the loss occurs by default or negligence of the captain, the proprietors of the goods have recourse against him (*actio ex conducto*) for the repayment of the damage, and against the owners of the ship, to the value of the ship and freight, (*actio exercitoria*) in which case the owners may abandon the ship and freight, and discharge themselves, but the captain's obligation to indemnify is personal.—*Consulat. de la mar.*, ch. 61, et suiv. *Jugemens d'Oleron*, art. 10, 11. *Ord. Wisbuy*, art. 22, 23, et 36. *Ord. de la mar.*, art. 4, tit. des Avaries.

3. What is the distinction taken in the books between a particular average and a partial loss?

The term "particular average," is used to signify the mode of adjusting a loss on goods arising from the article being deteriorated in value, in consequence of its being sea damaged; and the term "partial loss," to signify a total loss of part of the thing insured.—*Stev. & Ben. on Av.* p. 281.

4. What is the most correct mode of adjusting a particular average?

It is by comparing the market price of the sound merchandise with the market price of the damaged; and thus ascertaining the relative depreciation in value sustained by the merchant from the sea damage. In *Johnson v. Shedden*, 2 *East's Rep.* 581, the court of king's bench decided that the true mode of calculating a partial loss on goods sea damaged, and ascertaining the extent of the underwriters' liability, is by a comparison between the gross produce of the sound and damaged goods; this is now the settled law of England and the United States.—3 *Boss. & Pull. Rep.* 308. 3 *Kent*, 337. But though the mode of adjustment in use has a reference to the market price, it is perfectly understood that the underwriter has no concern with the fluctuation of the markets, and therefore, whether they be high or low, it is of no importance to him. The merchant makes use of them merely as scales to show the relative depreciation in value of the damaged goods; for (to carry the simile further,) if sound merchandise of the same quality were put in one scale, and the damaged merchandise in the other, and the sound weighed one hundred pounds, and the damaged but fifty pounds, it would be shown that the goods had lost fifty per cent. of their original value, and by this means the proportion of deterioration would be ascertained.

The amount of indemnity is ascertained by taking into consideration the actual market value of the goods at the port of departure, or when that cannot be ascertained, the invoice price at the loading port, and taking with that the premium of insurance and commission, as the basis of the calculation.—*Snell v. Delaware Ins. Co.*, 4 *Dallas' Rep.* 430. *Carson v. Mar. Ins. Co.*, 2 *Wash. C. C. Rep.* 468. 1 *Johns. Cas.* 120. 7 *Johns. Rep.* 343. 12 *East's Rep.* 468. This is admitted in the French law to afford all the indemnity that was stipulated by the policy.—*Boulay Paty*, tome 4,

41, 42. The premium of insurance is considered as part of the value of the goods. If extraordinary expenses, and extra freight, be incurred in carrying on the cargo in another vessel, when the first one becomes disabled by the perils of the sea, the French rule is, to charge the same upon the insurer of the cargo.—*Emerigon*, tome 1, 429, 433. *Code de Commerce*, art. 391, 393.

5. What is the rule of adjusting partial loss, technically so called?

A partial loss, properly so called, is a total loss of a part of the interest;—*ex. gr.* in an insurance on twenty hogsheads of sugar, if one is washed out, that is called a partial loss, therefore, the amount lost must be paid for at the prime cost, or the value in the policy; because the goods never having arrived, no reference can be had to the market price at the port of discharge; that being resorted to, merely to ascertain the *quantum* of damage. Whenever there is a total loss of any part of the interest, it must be settled in the same manner as a total loss of the *whole*. When a partial loss, and a particular average, both occur on the same interest, the most correct practice is, to adjust them separately.—*Stev. & Ben. on Av.* p. 335.

6. What is the rule for adjusting partial loss, or particular average on ships?

The rule is, to apply the old materials towards the payment of the new, by deducting the value of them from the gross amount of the expenses for the repairs, and to allow the deduction of one-third new for old upon the balance.—*Burnes v. Nat. Ins. Co.*, 1 *Cowen*, 265. *Savage, Ch. J.*, in *Dickey v. New-York Ins. Co.*, 4 *Ibid*, 425. *Brook v. Oriental Ins. Co.*, 7 *Pick.* 259. The rule applies equally to steam vessels insured on our interior waters.—*Wallace v. Ohio Ins. Co.*, 4 *Ohio Rep.* 284. *Fenwick v. Robinson*, 1 *Dawson & Lloyd*, 8. In this country, deduction of one-third new for old is made, whether the vessel be new or old.—*Denham v. Com. Ins. Co.*, 11 *Johns. Rep.* 315. *Sewall v. U. S. Ins. Co.*, 11 *Pick.* 90. Temporary repairs in the course of the voyage, are held to be particular average; but other repairs abroad, from strict necessity, to enable the vessel to return, and which become useless afterwards, are general average.—*Brooks v. Oriental Ins. Co.*, 7 *Ibid*, 259.

Neither Mr. Stevens nor Mr. Benecke mentions particular average on freight. Such an average may occur where only a part of the voyage is performed, or only a part of the freight delivered. In case of freight, *pro rata itineris peracti* being earned by a performance of a part of the voyage, the question occurs whether the distance performed, and to be performed, are according to the comparative rate of freight for the whole voyage insured, and for the part of the voyage to be performed; in the case of *Lock v. Lyde*, 2 *Burr*, c. 882, the former rule is adopted, but in a case decided in Massachusetts in respect to a vessel wrecked on Cape Cod, on a voyage from Demarara to Biddeford, Mr. Chief Justice Parsons said, the *pro rata* freight earned by the original vessel was the difference between the rate of freight for the whole voyage, and that from the place

of the wreck to the port of destination.—*Coffin et al. v. Storer*, 5 Mass. R. 252, the same doctrine was adopted in New-York.—*Searle et al. v. Scovell*, 4 Johns. Chan. R. 218. *American Ins. Co. v. Center*, 4 Wend. 45. Both cited fully, 2 Phil. Ins. c. 16, § 2. Indeed, the case seems to admit of no doubt.

7. What is the rule for the adjustment of salvage loss?

The rule generally acted on, is that the underwriter pays a total loss and takes the proceeds of the goods.

A salvage loss, (from which this mode of adjustment is derived,) is that kind of loss which it is presumed would, but for certain services rendered and exertions made, have become a total loss. The charges incurred are called "salvage charges," the property saved is "the salvage" and the difference between the amount of the salvage (after deducting the charges) and the original value of the property is called "the salvage loss."—*Ben. & Stev. on Average*, p. 283. 4 *Taunt. Rep.* p. 803, for cases of salvage see *Dig.* 3, 5. *The Calypso*, 2 *Hagg. Adm. Rep.* 217, 218. 1 *Rob. Adm. Rep.* 278. *The Aquila*, 1 *Rob. Adm. Rep.* 32. *The two Friends*, *Ibid.*, 225. *The Sarah*, cited in a note to *ibid.*, 263. *Marshall, C. J.*, 2 *Cranch's Rep.* 267. *Bond v. Brig Cora*, 2 *Wash. Cir. Rep.* 80. *L'Esperance*, 1 *Dod. Rep.* 46. *The Francis Mary*, 2 *Hag. Adm. Rep.* 89. *The Reliance*, *ibid.*, 90 note. *The Charlotte*, *ibid.*, 361. *The Fortunia*, 4 *Rob. Adm. Rep.* 193, & *L'Esperance*, 1 *Dod. Rep.* 46. *The Blendonhall*, *ibid.*, 414, 421. *The Elliotta*, 2 *ibid.*, 75. *Rowe v. The brig—*, 1 *Mason's Rep.* 372. *The Henry Eubank*, *Am. Jurist*, No. 23, 67. 2 *Cranch, Rep.* 268. *The Neptune*, 1 *Hagg. Adm. Rep.* 236. *Noorman v. Walters*, 3 *Boss. & Pull.* 612. *Bond v. The Brig Cora*, 2 *Wash. Cir. Rep.* 80. *Case v. La Tigre*, 3 *ibid.*, 567. *The Branston*, 2 *Hag. adm. Rep.* 3, note. *The Vine*, *ibid.*, 1. *The Blaireau*, 2 *Cranch, Rep.* 240. *The brig Harmony*, 1 *Peters' Adm. Rep.* 34, note. *The Calacia*, 2 *Hag. Adm. Rep.* 262. *Sir William Scott in the Joseph Harvey*, 1 *Rob. Adm. Rep.* 257, *Phil. edition.* *The Beaver*, 3 *Rob. Adm. Rep.* 292. *Talbot v. Seaman*, 1 *Cranch's R.* 1.

OF THE MEMORANDUM.

1. What is understood by the memorandum?

Exceptions in the policy of certain articles enumerated on which the underwriters are not liable for particular average, but there is very considerable diversity in these enumerations. The English memorandum is as follows: fish, fruit, flour and seed, are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average, under five pounds *per cent.* and all other goods, also the ship and freight are warranted free of average, under three pounds *per cent.* unless general or the ship be stranded.

In a form of policy at present used by an insurance company of Paris, this exception extends to salt, fish, fruit, grain, hemp, hides and skins; and in some forms formerly used, the article of *flax* was added to this list.

In New York, the common policies exempt the insurers from particular average on salt, dry fish, fruits, whether preserved or otherwise, grain, hempen yarn, hides and skins, bar and sheet iron, iron ware, tin plates, tobacco, indian meal, cheese, vegetables and roots, cotton bagging, pleasure carriages, household furniture, musical instruments, and looking glasses. The articles usually insured free of average in Philadelphia, are salt, dried fish stowed in bulk, wheat, indian corn, and grain of any kind, malt and bread stowed in bulk, and leaf tobacco; or, in some policies, tobacco in casks.

All these policies, both English and American, exempt the insurers from particular average on all other articles perishable, or as it is expressed in some policies, esteemed perishable in their nature.

In Boston the insurers are not liable for a partial loss under 7 per cent. on sugar, flaxseed, bread, tobacco and rice. In New York they are not liable for partial loss under twenty per cent. upon hemp; or under ten per cent. upon coffee or pepper, in bags, or in bulk; or under seven per cent. upon sugar, flaxseed or bread. In Baltimore they are exempted from partial losses under ten per cent. upon coffee in bags, and, in some policies, a similar exception is extended to cocoa in bags. In the policy of one of the Insurance Companies of Charleston, particular average under seven per cent. is excepted on sugar, coffee, cocoa, hemp, flax, flaxseed, bread, skins, hides and tobacco; and under ten per cent. on the following articles in bags, namely, coffee, cocoa, pimento, and all other East and West India articles. The Philadelphia policies do not contain any exception of particular average under a certain rate, besides the general exception of those under five per cent.—1 *Phil. Ins.* p. 485, 486.

2. What construction is put upon the words warranted free from average, unless general?

It has been settled that when goods are warranted free of average, the underwriters are liable to pay a total loss of a part, or a partial loss of the whole, if part of the thing insured *go in bulk to the bottom of the sea*; and—That, (with the same warranty,) they are not liable to pay a partial loss, though it be in fact a total loss of a part, if the loss be the *consequence of sea damage*.

The insurer on memorandum articles is liable only for a total loss which can never happen when the cargo, or part of it, has been sent on by the insured, and reaches the original port of destination.

If the loss be total in reality, or is such as the insured is permitted to treat as such, he may abandon and recover as for a total loss, in the case of memorandum articles; but with this exception, that he is not permitted to turn a partial into a total loss.—*Moreau v. The United States Insurance Company*, 1 *Wheat.* 519.

Where insurance was on indian corn, and the vessel being wrecked near the port of destination, the agent of the insured employed hands, who saved nearly half of the cargo, landed, dried it, and sent it on to the port of destination, where it was sold for about one-fourth of the price of sound corn, leaving a very inconsiderable balance after paying the expenses, it was held a partial and not a total loss, and the insurer not responsible.—

Moreau v. The United States Ins. Co., 3 Wash. C. C. R. 256. *Mason v. Skurrey at N. P., Park*, 7th edit. 121. *Cocking v. Fraser, Park*, 181, 7th edit. *M. Andrews v. Vaughan, N. P., Park*, 7th edit., 185. *Dyson v. Rowcroft*, 3 Boss. & Pull. 474. *Anderson v. Royal Exchange Assur.*, 7th East, 38. 15 East, 563. *Davy v. Milford*, 15 East, 559. *Thompson v. Royal Exchange Assur.*, 16 East, 214. *Headbery v. Pearson*, 7 Taunt. 154. *Glennie v. London Assur. Co.*, 2 M. & S. 371. From the above cases it appears without contradiction, that when goods, "warranted free of particular average," (or free of particular average unless the ship be stranded, and where no stranding takes place,) are saved so as to remain in specie in the hands of the assured, and are of some value, however small, even much less than the freight, this is only a particular average, and no abandonment can take place. And if part of the goods be wholly lost and another part saved, that part which is wholly lost is considered a total loss upon the underwriter.

3. What is the rule where memorandum articles arrive in specie, but by reason of sea damage or any other peril insured against, are of no value?

It is to consider such a case as a total loss, at the charge of the underwriter.—*Biays v. The Chesapeake Ins. Co.*, 7 Cranch, 415. *Moreau v. The United States Ins. Co.*, 1 Wheat. Rep. 219, 227. *Humphrey v. The Union Ins. Co.*, 3 Mason, 429. *Wardsworth v. Pacific Ins. Co.*, 4 Wend. 33. *Brooke v. Louisiana Ins. Co.*, 17 Martin, 520. In *Perry v. Aberdeen*, 9 Barn. & Cres. 611. 17 Serg. & Lowb. 408, it was held, that though the article remained in specie, yet so damaged by perils of the seas as not to be worth carrying on to the port of destination, it was a total loss, not merely of the voyage, "but of the thing insured."—*Cologan v. London Ass. Co.*, 5 M. & S. 456. 2 Phil. Ins., c. 18, No. 13. *Neilson v. London Ins. Co.*, 3 Caines' Rep. 108. 1 Phil. Ins. 488. *Saltus v. Ocean Ins. Co.*, 14 Johns. Rep. 139. *Buchanan v. The Ocean Ins. Co.*, 6 Cowen, 318. *Treadwell v. Union Ins. Co.*, 6 Cowen, 270. 2 Phillips on Insur., c. 18, No. 16.

The clause "*franc d'avaries*" in the French policies, is understood to exempt the underwriters from all damages which do not justify an abandonment.—*La clause franc d'avaries affranchit les assureurs de toutes avaries, soit communes, soit particulières, excepté dans les cas qui donnent ouverture au délaissement; et dans ces cas, les assureurs ont l'option entre le délaissement et l'exercice d'action d'avarie.*—Code de Commerce, art. 409. *Boulay Paty*, tome 4, p. 515. *Emerigon*, tome 1, p. 664.

The reader wishing to become thoroughly acquainted with the doctrine of average in all its forms, is recommended to the perusal of Mr. Phillips' edition of Stevens and Benecke on Average, a work embracing the principal merits of both those distinguished writers on the principles of indemnity, and which clearly lays down nearly all the practical rules applicable to the subject; and gives examples of adjustment, worked out at full length, calculated to meet a great variety of cases.

RE-ASSURANCE AND DOUBLE ASSURANCE.

1. What is re-assurance ?

It is where an insurer has the sum he hath insured re-assured to him by some other insurer. The object of this is indemnity against his own act; and if he gives a less premium for the re-assurance, all his gain is the difference between what he receives as a premium for the original insurance, and what he gives for the indemnity against his own policy.

These re-assurances are prohibited in England, except in special cases, by the statute 19 Geo. II., ch. 37, but they are allowed with us.—*Hastie v. De Peyster*, 3 *Caines' Rep.* 190. *Merry v. Prince*, 2 *Mass. R.* 176. 3 *Kent*, 279. The contract of re-assurances is totally distinct from, and unconnected with, the primitive insurance, and the re-assured is obliged to prove the loading and value of the goods, and the existence and extent of the loss, in the same manner as if he were the original insured.—*Poth. Tr. d'Ass.* 153. *Emerigon*, tome 1, 247, 250. He need not abandon to the re-insurer, as soon as the first insurer has abandoned to him, for he has no connection with the first insurance. If he proves the original claim against him to be valid, when he resorts over to the re-insurer, he makes out a case for indemnity.—*Hastie v. De Peyster*, *ub. sup.*

These re-assurances are allowed by the French Ordinances.—*Ord. de la mar. des Ass.*, art. 20. *Code de Commerce*, art. 342, and the first insurer can re-assure to the same amount; but the better opinion is, that he cannot insure the premium due him for the first insurance.—3 *Kent*, 279. *Valin*, sur l'Ord. l'art 20 du titre des Ass. *Pothier*, *Traité des Ass.*, No. 85. *Code de Commerce*, art. 342. By which rule it appears that if a ship be insured for \$10,000, the insurer may re-assure for that sum, but cannot include the premium which he pays to the insurer. *Emerigon* holds a contrary opinion, and contends that the re-assured may, by the general principles of the law of insurance, include the premium which he pays in the valuation; he holds the chance of paying a higher premium, in case of a safe return of the ship, to be sufficient risk to support the policy; but this position is shown to be entirely false by *Estrangin* and *Boulay Paty*, who contend that it is contrary to the principles of the law, to make any one a gainer by the loss of the thing insured, or to indemnify against the safe arrival of the ship.—*Boulay Paty*, tome 3, p. 443.

2. What is understood by double assurance ?

It is where the insured makes two insurances on the same risk and the same interest; but the law will not allow him to receive a double satisfaction in case of loss, though he may sue on both policies. The underwriters on the different policies are bound to contribute ratably towards the loss.—*Rogers v. Davis*, and *Davis v. Gilbert*, decided at N. P. by Lord Mansfield, *Park on Insurance*, 374, 375, 6th edit. *Lucan v. Jefferson Ins. Co.*, 6 *Cowen, Rep.* 635. *Newbury v. Read*, 1 *Black. Rep.* 416. 4 *Dallas Rep.* 348. *App. p.* 32.

The French rule is, that if there exist several contracts of insurance

on the same interest and risk, and the first policy covers the whole value of the subject, it bears the whole loss, and the subsequent insurers are discharged, on returning all but half per cent. premium.—*Code de Commerce, art. 359.*

RETURN OF PREMIUM.

1. In what case may the insured demand a return of premium?

If the insurance be void *ab initio*, or the risk has not been commenced, the insured is entitled to a return of premium. If the insurance be made without any interest whatsoever in the thing insured, and if this proceeds through mistake, misinformation, or any other innocent cause, the premium is to be returned. So, if the insurance be made with short interest, or for more than the real interest, there is to be a rateable return of premium. If the risk has not been run, whether it be owing to the fault, pleasure or will of the insured, or to any other cause, the premium must be returned; for the consideration for which it was given fails.—3 *Kent's Commentaries*, 341. *Tyrie v. Fletcher*, *Cowp. Rep.* 666. *Loraine v. Tomlinson*, *Dougl. Rep.* 585. 8 *Term. Rep.* 156, *arg.* *Holmes v. Union Ins. Co.*, 2 *Johns. Cases*, 329. *Taylor v. Summer*, 4 *Mass. Rep.* 56. If the premium is to be returned, it is the usage in every country, where it is not otherwise expressly stipulated in the policy, for the insured to retain one-half per cent. by way of indemnity for his trouble and concern in the transaction.—*Emerigon*, tome 2, p. 154. 1 *Phillips on Ins.* 503. *Code de Commerce, art. 349.* *Hendricks v. Com. Ins. Co.*, 8 *Johns. Rep.* 1.

The insurer retains the premium in all cases of actual fraud on the part of the insured, or his agent.—*Tyler v. Horne*, *Park on Insurance*, 285. *Chapman v. Frazer*, 1 *Marsh. on Insurance*, 652, *March v. Abel*, 3 *Boss. & Pull*, 35. *Van Dyck v. Hewitt*, 1 *East's Rep.* 96. *Stevenson v. Snow*, 3 *Burr. Rep.* 1237. *Long v. Allen*, *Marshall on Ins.* 660. *Donath v. Ins. Co. of N. A.*, 4 *Dallas' Rep.* 463. *Ogden v. Firemen's Ins. Co.*, 12 *Johns. Rep.* 114. 1 *Phillips on Insurance*, 503—510. *Code de Commerce, art. 356.* *Boulay Paty*, tome 4, p. 98.

OF THE REMEDY UPON A POLICY.

The ordinary remedy under a policy is in a court of law; but sometimes matters arise out of a contract of this nature, which fall peculiarly within the cognizance of a court of equity. It may be proper to premise that a clause in a policy of insurance, or a covenant in a deed, by which the parties agree, in case of a dispute, to submit matters to arbitration, does not oust the jurisdiction of the Courts at Westminster and cannot be pleaded in bar to an action.—*Hill v. Holleston*, 1 *Wils.* 129. *Thompson v. Charnock*, 8 *Term Rep.* 139.

When a mistake has been made in the drawing of a policy of insurance, a court of equity will direct it to be rectified according to the true

intention of the parties.—*Henkle v. Royal Exchange Assurance Company*, 1 Ves., Senr., 313. *Motteux v. The London Assur. Co.*, 1 Atk. 545.

1. What is the form of the remedy upon a policy?

It is by action of *assumpsit*, when the policy is not under seal; or of *debt*, or *covenant*, when it is under seal. The declaration in *assumpsit* sets forth, 1. The policy, and memorandum annexed to it, as effected by the party interested, or by an agent. 2. The defendant's subscription of the policy and promise. 3. The shipment of the goods when the policy is on goods, or the right to freight, when it is on freight. 4. The names of the persons interested. 5. The sailing on the voyage, and the cause of loss. 6. The amount of the loss. The form of action in debt or covenant, when the policy is under seal, contains similar averments adapted to the nature of the security.—*McDougal v. Royal Exchange Assur. Comp.*, 4 Maule & Selw. 503.

2. What is the manner of describing the policy?

It must be described according to its legal effect, and a material variance would be fatal. It is usually set forth in the past tense, in the precise terms in which it was made. The regulation endorsed on a policy, and forming a part of it, must be stated. But it is not absolutely necessary to set forth the exact tenor, the legal effect is sufficient.—*Strong v. Harvey*, 3 Bing. 404.

With regard to the extent of the remedy, it may be observed, that the insurer is liable for all the labor and expense attendant upon an accident, which forces a vessel into port to be repaired, and in consequence of the general permission in the policy for the insured to labor for the recovery of the property, the insurer may be rendered liable for the expenses incurred in the attempt to recover the lost property, in addition to the payment of a total loss.—*Shiff v. Miss. Ins. Co.*, 1 Miller's Louis. Rep. 304. 1 Caines' Rep. 284, 450. 7 Johns. Rep. 62, 424, 433. 4 Taunt. Rep. 367. This, however, is contrary to the French rule, which is, that the insured cannot cumulate a partial with a total loss. This was settled after much litigation in the court of Cassation, in the case of *Kermel v. The Royal Assurance Co. of Paris*, in 1823, reported in the *Journal de Cassation de MM. d'Allox et Tournemine*, and quoted at length by *M. Boulay Paty*, tome 4, p. 19 to 23. In this case the ship Theophilus, fitted out by M. Kermel, sailed on the ninth September, 1817, from Rochelle, bound for the isles of France and Bourbon, on the 28th January, 1818. At the Isle of France she sustained a damage that cost 26,058 fr. to repair.

On the 28th of May following, she was insured by two policies, one on the ship for 50,000 fr., and the other on the merchandise for 40,000 fr. at 3½ per cent. premium, the assurers assuming the risk of barratry, and generally, all accidents of perils of the sea. On the 18th June, of the same year, Kermel was informed of the loss, on the 28th January preceding, and gave notice to the insurers. On the 11th July following, the ship departed with her cargo, for St. Malo, but was obliged to put into Dartmouth to purchase provisions, and to repair new damages, which

having completed, she sailed for her port of destination; and after a tedious and perilous passage, arrived at St. Malo, where she was stranded on entering the harbor, on the 14th of January, 1819.

On the 15th of February following, Kermel abandoned to the insurers, and claimed also the partial losses, which the ship had sustained during the voyage. The company refused to pay more than the total loss, or the amount in the policy. Kermel brought his action before the tribunal of commerce of Rochelle, and had judgment, not only for the total loss, but for his whole claim; the company appealed to the royal court of Poitiers, where the judgment was confirmed on the 8th of February, 1820.

The principle upon which this decision was founded was that, as the policy did not contain the clause "*franc et quittés d'avaries*," the insurers were bound to reimburse all expenses occasioned by the perils insured against, and founded their decision upon the *Code de Com.*, art. 393, 409, 332.

From this *arrêt* the Company appealed to the Cour de Cassation, upon three grounds—

1. That the decision of the Court of Poitiers was contrary to the doctrine of the law of insurance.

2. That it was in contravention of the new law.

3. That it was contrary to the general principles of equity.

The appeal was sustained, and the judgment below reversed, and, as it was said, upon both principle and authority. The question was elaborately discussed on both sides, and numerous continental authors cited, some of whom are inserted below. Upon principle it was contended, upon the part of the company, that if the insurers were liable for a cumulation of partial and total losses to any sum above the amount expressed in the policy, they would be for a succession of partial losses, which might amount in the whole to twice or even three times the valuation in the policy; a sum for which the insurers receive no premium, and which was not in contemplation of the contract; and this I presume is the point upon which the question turned.—*Pothier, Traité du Contrat d'Assurance*, Nos. 2, 3. *Bornier sur l'art. 7. De l'Ordonnance du Com., et le Répertoire*, p. 360. *Valin sur l'art. 6 de l'Ord. Emerigon*, ch. 1. *Werderekop, Introductio ad jus Mar.*, § 95, tit. 7, lib. 3. *Werlot, Traité de la Policé d'Ass.* 1, § 16; 2, § 10, No. 18. *Dhen Diss.*, § 56. *Straccha Gloss.* 20, No. 4.

OF POLICIES ON LIVES.

1. What is understood by an insurance on a person's life?

It is a contract by which the insurer, in consideration of a premium, proportioned to the age, health, and other circumstances of the person whose life is the object of insurance, agrees to pay a certain sum in the event of his decease, either within a fixed time, or, generally, at any indefinite period.

2. What will amount to an insurable interest in a life?

A person may insure his own life, and any person having a beneficial interest in a life, may insure the interest by the act of 14 Geo. III., chap. 4, from which it may be inferred that the domestic relation of husband, wife, father, child, if dependent upon the father, and master and servant, are insurable interests. A creditor has an insurable interest in the life of his debtor, to the amount of his debt, but cannot recover on the policy after the debt is paid, though the debtor die before payment.—*Godsall et al. v. Boldero*, 9 *East*, 72.

The creditor having a mortgage security does not affect his insurable interest; and a debt contracted with an infant, if not fraudulent, is sufficient to support a policy.—*Anderson v. Edie*, *Park*, 640. 10 *East*, 344. 5 *Maule v. Selw.* 423. *Dwyer v. Edie*, *Park*, 639. *Tisdswell v. Angerstein*, *Peake's Rep.* 151.

A policy effected by a bankrupt upon his own life, at an annual premium, passes to his assignees, however the apparent value of it may be at the time, and although there may be considerable arrears of premium due upon it at the time.—*Schondler et al. v. Wase*, 1 *Camp.* 487.

And see the assignability of a policy in equity.—1 *T. R.* 262. *New Rep.* 223. 2 *Atk.* 555. 4 *Bro. P. C.* 431. 1 *B. Moore*, 247. 8 *Taunt.* 264. 1 *T. R.* 22. 7 *Ib.* 157. 6 *Ibid.* 681. 2 *Stark.* 395.

As to the warranty and construction thereof, see *Burder v. Browning*, 1 *Taunt.* 522. 5 *Ves.* 620. *Ross v. Bradshaw*, 1 *Black. Rep.* 312. *Willis v. Poole*, *Park*, 650. *Watson v. Mainwaring*, 4 *Taunt.* 763. *Morrison v. Musprat*, 3 *Bing.* 60. *Aveson v. Lord Kinnaird*, 6 *East*, 188. 2 *Smith*, 646. *Stackpole v. Simion*, *Park*, 648. *Huguenin v. Bailey*, 6 *Taunt.* 186.

The *bona fide* assignees of a life policy may sue in the name of the assignor.—*Ashley v. Ashley*, 3 *Simons*, 149. *Amicable Society v. Bolland*, 2 *Dow. & Clark*, 1. *Holland v. Disney*, 3 *Russell*, 4. *Bligh*, 194. *Lord v. Dale*, 12 *Mass. Rep.* 115. 3 *Kent's Com.* 364 *et seq.*

THE END.

